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Territorial Authority and Personal Jurisdiction

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TERRITORIAL AUTHORITY AND PERSONAL JURISDICTION

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Considerable controversy exists regarding the extent to which American state courts may exercise personal jurisdiction over nonresidents not present in the forum state. On the one hand, the Supreme Court apparently established a clear standard in *World-Wide Volkswagen v. Woodson*.[1] In *World-Wide*, the Court explained that due process limitations on personal jurisdiction reflect both the right of the defendant to a fair proceeding *and* territorial limitations on state power.[2] Given this second consideration, the Court held that only courts of those states with which the defendant's contacts are intentional or to which the stream of commerce carries some product sold by the defendant can subject nonresident defendants to their jurisdiction.[3] The Court expressly rejected the argument that the plaintiff's convenience or the forum state's interest in applying its own law were in any way relevant to the territorial power question.[4] Despite the clarity of the *World-Wide* rule, distinguished commentators continue to attack the conclusions of that case.[5] Further, one commentator suggests that such factors as a state's interest in applying its own law and the plaintiff's relative convenience should be treated as controlling in the jurisdictional inquiry.[6] Indeed, some legal scholars would treat personal jurisdiction as a venue question and rely on strict

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1. 444 U.S. 286 (1980).
2. *Id.* at 291-92.
3. *Id.* at 297-98.
4. *Id.* at 294.
5. *See, e.g.*, Braveman, *Interstate Federalism and Personal Jurisdiction*, 33 SYRACUSE L. REV. 533 (1982); Gottlieb, *In Search of the Link Between Due Process and Jurisdiction*, 60 WASH. U.L.Q. 1291 (1983); Jay, *"Minimum Contacts" as a Unified Theory of Personal Jurisdiction: A Reappraisal*, 59 N.C.L. REV. 429 (1981); Lewis, *A Brave New World For Personal Jurisdiction Flexible Tests Under Uniform Standards*, 37 VAND. L. REV. 1 (1984); Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U.L. REV. 1112 (1981).
6. von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U.L. REV. 279, 313, 327-28 (1983).

choice-of-law rules to protect defendants from abuse.[7]

The importance of the difference in views between the Court and commentators is easy to underestimate. In any particular lawsuit, the only consequence of a successful challenge to personal jurisdiction is that a plaintiff who preferred to sue in one state must begin again in another state. Thus, treatment of personal jurisdiction issues as involving nothing more important than a choice of courthouses is hardly surprising. To stop the analysis here, however, is to miss the fundamental issue that personal jurisdiction questions raise—governmental authority. When the Supreme Court holds that a state may not exercise jurisdiction over a defendant, that defendant is exempt from the state's control. The Court is saying, in effect, that the state is not entitled to demand from this defendant the deference that governments may expect from their own citizens. The controversy over standards of personal jurisdiction therefore implicates more than just selecting a courthouse; it is a dispute about how to determine when a particular state government may demand obedience from a particular person.

This disagreement between the Supreme Court and legal writers goes to the heart of basic questions of legal obligation in this country and thus deserves resolution. An examination of the two positions makes it clear why resolution is difficult: the disputants not only reach different conclusions, but also define the problem in fundamentally different ways. Those commentators who disagree with the Supreme Court's view tend to see the issue first and foremost as one of litigation fairness—finding a place to litigate the lawsuit that is likely to minimize problems of proof and inconvenience to the parties.[8] The Supreme Court's approach in *World-Wide*, however, is completely different. The Court justified the limitations that it imposed on state jurisdiction as logically inevitable consequences of the general territorial limitations on state sovereignty, flowing from the states' status as co-equal members of the federation that is the United States.[9] The Court considered the limits of personal jurisdiction as an aspect of the limits on state authority generally. Although the Court invoked interstate federalism[10] as the limiting factor on juris-

7. *See, e.g.*, Silberman, *Can the State of Minnesota Bind the Nation? Federal Choice-of-Law Constraints After* Allstate Insurance Co. v. Hague, 10 HOFSTRA L. REV. 103 (1981).

8. Braveman, *supra* note 5, at 564 n.28; Jay, *supra* note 5, at 453-54; Lewis, *supra* note 5, at 26-38; Redish, *supra* note 5, at 1137-42; von Mehren, *supra* note 6, at 300-11.

9. *World-Wide*, 444 U.S. at 294.

10. *Id.*

diction, it did not explain the connection between the general concept of federalism and the particular limitations that *World-Wide* imposed on state court jurisdiction. Rather, the Court asserted its conclusion and then stopped.

Problems clearly exist with the approaches of both the Supreme Court and the commentators. The commentators' approach is the more flawed. If territorial limitations on the reach of state sovereignty actually exist, then any particular aspect of state power, such as judicial jurisdiction, must necessarily be subject to those limits. The general limits on state sovereignty, therefore, *must* be the starting point of the analysis. Attempts to address issues of personal jurisdiction without addressing the larger issue of the limits of state sovereignty ignore a key part of the problem. Indeed, the very term "jurisdiction" indicates that the issue deals with fundamental limitations on authority.[11] A simple reference to the efficient functioning of the institution whose authority is in issue cannot answer questions of the limits of authority, unless efficiency is demonstrated to be a source of authority for that institution.

The *World-Wide* approach is also problematic. The Court, by failing to spell out the steps in its reasoning, has caused considerable and unnecessary mystification. Moreover, while the Court's approach of deducing limits on one element of state sovereignty from general limits on state sovereignty makes sense as a matter of logic, the particular conclusion it reached—that a defendant is subject to the jurisdiction only of those states with which he sought contact or to which his products come through the stream of commerce—does not follow clearly from the premises of the argument.

This Article seeks to clear up the confusion caused by the arguments of commentators and the holes in *World-Wide*. More specifically, it seeks to show that the Supreme Court was correct in its implicit assertion in *World-Wide* that, given the nature of the federal system, the authority of American states is territorially limited. It further seeks to determine the content of the general territorial limitations on state authority and to deduce the particular limitations that should apply to personal jurisdiction. The Article concludes that the Supreme Court was correct in asserting that the logic of the federal system requires the conclusion that a state may assert jurisdiction only over nonresidents who have liability-

11. "[T]he authority by which courts and judicial officers take cognizance of and decide cases . . . . Power and authority of a court to hear and determine a judicial proceeding." BLACK'S LAW DICTIONARY 766 (5th ed. 1979).

related contacts with state territory. The Articles also concludes, however, that the federalism argument does not logically support the requirement that the defendant's contacts be intentional.

This Article will achieve its objectives through a three-part discussion. Part I provides a brief description of the development of the law of personal jurisdiction in the United States. In Part II, the Article presents in detail the arguments supporting the conclusions described above. Part III will refute various arguments that have been raised attacking territory-based jurisdictional analysis.

I. BACKGROUND

The Supreme Court considered the question of personal jurisdiction as early as 1850 in *D'Arcy v. Ketchum*.[12] In *D'Arcy*, the Court held that a judgment against a defendant over whom the court rendering judgment never obtained personal jurisdiction was not entitled to enforcement outside the rendering state under the full faith and credit clause of the Constitution.[13] The Court further held that "the international law as it existed among the states in 1790"[14] determined the existence of personal jurisdiction.

In *Pennoyer v. Neff*,[15] the Court held that a personal judgment against a nonresident was entitled to full faith and credit only if the defendant was either served with process within the forum state or consented to the state's jurisdiction.[16] In extended dictum more influential than its holding, the *Pennoyer* Court stated that a personal judgment against a nonresident obtained without in-state service of process was not enforceable in the forum state. A judgment so obtained, the Court stated, denied the defendant the Fourteenth Amendment's guarantee of due process. The Court noted that due process required that courts must obtain in-state service of process before their assertions of jurisdiction could be valid.[17]

In the decades following *Pennoyer*, courts treated its dictum as controlling and continued to view personal jurisdiction as a matter of due process. *Pennoyer's* insistence upon in-state service of process, however,

12. 52 U.S. (11 Howard) 165 (1850).
13. *Id.* at 175-76.
14. *Id.* at 176.
15. 95 U.S. 714 (1877).
16. *Id.* at 729-33. The Court supported these standards of jurisdiction with a reference to *D'Arcy*'s invocation of "the international law as it existed among the states in 1790." *Id.* at 730.
17. *Id.* at 733.

was increasingly circumvented as courts found themselves faced with torts committed by persons temporarily in the state or with breaches of contracts negotiated and performed in several states. Finally, in *International Shoe Co. v. Washington*,[18] the Supreme Court reformulated the *Pennoyer* test. The Court held that an absent defendant could properly be sued in a state if he had "certain minimum contacts" with the state such that maintenance of the suit did not offend "traditional notions of fair play and substantial justice."[19] The Court stressed that the less extensive the defendant's contacts were, the more closely the contacts must relate to the litigation at issue if assertion of jurisdiction was to satisfy due process.[20] The Court also emphasized that a state may not assert jurisdiction over a defendant "with which the state has no contacts, ties, or relations."[21]

The minimum contacts tests was strongly restated in *Hanson v. Denckla*.[22] In *Hanson*, the Court stressed that limitations on the personal jurisdiction of state courts were a consequence of "territorial limitations on the power of the respective states."[23] The Court rejected the argument that in-state activity by one claiming a relationship to the defendant could satisfy the minimum contacts test, and insisted that defendant's contact with the state must be purposeful.[24]

Over the next eighteen years, the Supreme Court addressed personal jurisdiction infrequently,[25] and state courts began to edge away from *Hanson*'s strict emphasis on proof of purposeful contact to establish personal jurisdiction.[26] In *World-Wide Volkswagon Corp. v. Woodson*,[27] however, the Court restated the *Hanson* rule.

The Robinsons, plaintiffs in *World-Wide*, purchased a car while they were domiciled in New York, from Seaway, a New York car dealership.

18. 326 U.S. 310 (1945).

19. *Id.* at 316.

20. *Id.* at 317-18.

21. *Id.* at 319.

22. 357 U.S. 235 (1958).

23. *Id.* at 251.

24. *Id.* at 253.

25. *See, e.g.*, Kulko v. Superior Court, 436 U.S. 84 (1978) (dealing with personal jurisdiction in a family law context); Shaffer v. Heitner, 433 U.S. 186 (1977) (although addressing personal jurisdiction issues, *Shaffer* was noteworthy mainly for holding unconstitutional the assertion of so-called quasi in rem jurisdiction).

26. *See, e.g.*, Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969).

27. 444 U.S. 286 (1980).

Electing to move to Arizona some time after the purchase, the Robinsons were involved in an automobile accident as they drove through Oklahoma. They sued Seaway; its distributor, World-Wide; the importer of the car; and the manufacturer on a products liability theory in Oklahoma state court. World-Wide and Seaway's attack on the court's jurisdiction lost in the Oklahoma courts but succeeded in the Supreme Court.[28]

The *World-Wide* Court described the minimum contacts test as serving two functions; it not only protected defendants from distant litigation, but also insured that the "States, through their courts," did not reach beyond the limits of their sovereignty.[29] The Court referred to "principles of interstate federalism embodied in the Constitution," and stressed that the Constitution intended the states to retain attributes of sovereignty, that each state's sovereignty implied a limit on that of other states, and that such limitations were "express or implicit in . . . the original scheme of the Constitution."[30] The Court expressly held that federalism considerations could divest a state of jurisdiction even when the state had an interest in the litigation and was in no sense an inconvenient forum.[31] The Court held that jurisdiction depended on the defendant's purposeful conduct in seeking direct or indirect contact with the forum. The Court included within its definition of purposefulness the placing of goods in the "stream of the commerce" by which the goods are carried to the state. Finding not even that degree of purpose on the part of Seaway and World-Wide, the Court held that they were not subject to Oklahoma's jurisdiction.[32] The Court did not, however, explain how its purposefulness standard related to the controlling federalism considerations.

While *World-Wide* has drawn some sympathetic comment,[33] the decision has also received much hostile criticism. The criticism has varied, but the critics agree that federalism ought to have nothing to do with due

28. *Id.* at 288.

29. *Id.* at 291-92.

30. *Id.* at 293.

31. *Id.* at 294.

32. *Id.* at 295-99.

33. *See, e.g.*, Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 85; Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on* World-Wide Volkswagen Corp. v. Woodson *and* Rush v. Savchuk, 58 N.C.L. REV. 407 (1980).

process analysis of jurisdiction,[34] that due process jurisdictional analysis ought to turn on questions of convenience, and that the question of convenience to be considered is that of both parties.[35] These writers share the view that the limits on state authority are irrelevant to jurisdictional analysis.[36] Alternatively, these writers may be implicitly arguing that *no* territorial limits on state authority exist, and that therefore the only reason to forbid a state to take jurisdiction is that the state's assertion of authority would prejudice a litigant.

The basic assumption of this Article is that this approach is wrong. Because an assertion of jurisdiction is an assertion of authority, the existence of such authority must be demonstrated before any questions can arise as to proper policies for its exercise. Furthermore, the territorial authority of states in the American federal system is necessarily limited.

II. TERRITORIAL LIMITATIONS ON JURISDICTION

This Article asserts that territorial limitations on state court jurisdictions may be deduced from general federalism-related territorial limitations on state sovereignty. This assertion involves three propositions: first, that state sovereignty, as a matter of law, is limited territorially; second, that judicial jurisdiction is an aspect of the state's limited sovereignty; and third, that one may logically determine the content of territorial limits on judicial jurisdiction if one knows the content of general territorial limits on state authority. Each of these propositions requires some elaboration.

The first proposition rests on the argument that governments are governments of particular territories. Within its territory, a government has authority over things and people. That is, a government does not merely exercise brute power, but combines power with a claim on the obedience of whoever comes directly or indirectly within its territory. As to people outside its territory whose acts are unrelated to the territory, however, a government has no claim to obedience. Of course a government controls instruments of power and may choose to exercise those instruments in an

34. Braveman, *supra* note 5, at 534-54; Jay, *supra* note 5, at 474-75; Redish, *supra* note 5, at 1120-33.

35. Braveman, *supra* note 5, at 564 n.228; Jay, *supra* note 5, at 453-54; Lewis, *supra* note 5, at 26-38; von Mehren, *supra* note 6, at 300-11.

36. Professor Redish acknowledges that such considerations arguably are relevant in a full faith and credit context, although, he suggests, they probably should be ignored. Redish, *supra* note 5, at 1136-37.

unprincipled way, but such actions are ultra vires, that is, beyond its rightful authority.

The foregoing general limitations on governments apply to the states because the United States is a federation—an entity composed of smaller entities, each of which retains a measure of sovereignty. The states of the union are not mere administrative bodies, but are units distinct from the federal government. Of course, the states have relinquished, either in whole or in part, to the federal government their power concerning many subjects. Regarding many subjects, including much of the subject matter of litigation in the state courts, however, the states enjoy a large measure of sovereignty. Certainly, in their mutual dealings, the states can be compared to independent countries. Thus, because the nature of the American federation leaves a high degree of autonomy to the states, the members of the federation are most accurately seen as distinct governments. Accordingly, the territorial limitations described above as applying to governments generally should be expected to apply to the state governments.

Reference to federalism-related territorial limitations on state authority is not intended to suggest that personal jurisdiction issues necessarily require consideration of some aspect of federal-state or interstate relations. Rather, its description of territorial limitations on states as federalism-related means that, by organizing itself as a federation, the United States left a measure of sovereignty to the states. Therefore, because the authority of independent governments is limited by their territory, the at-least-semi-sovereign states ought to be subject to similar limitations.

While the proposition may be stated fairly simply, establishing that the authority of the states is inherently territorially limited as a matter of law is not so simple. Proof cannot be found in the text of the Constitution because that document does not address the issue. Indeed, one would not expect it to do so. Questions of the scope of the territorial authority of the states will arise only in cases of potential conflict between two states, because the differentiation in powers between the states and the federal government turns on questions of subject matter rather than of geography. The Constitution, however, was simply intended to establish the federal government and address potential federal-state conflicts. Given the long-standing existence of the states in 1787, the Constitutional Convention not surprisingly found it unnecessary to "establish" or define generally the powers of functioning state governments.

Although the Constitution does not spell out the geographical limits of

state authority, the courts have nonetheless had the opportunity to decide whether, as a matter of law, particular states may assert authority extra-territorially. As the cases set forth in the remainder of Part II will demonstrate, the courts have simply assumed that state authority is limited to state territory and have, in a number of contexts, held invalid actions amounting to the exercise of authority beyond state territory.[37] These decisions have implicitly upheld the proposition that, as a matter of law, a state's power is territorially limited.[38]

The second proposition is that a state's judicial jurisdiction is subject to the same limits that apply to state authority generally. This proposition is made explicit here because commentators often do not address the fact that an assertion of jurisdiction is a claim of state authority. But surely this point is beyond question. Every time a summons issues, the state is ordering a defendant to come to court and warning him that if he disobeys, he will suffer judgment. The state is further claiming the right to make a determination, binding everywhere, of the legal quality of defendant's acts. This state action is more than an effort to provide a forum for dispute resolution; it is an exercise of governmental power. Assertions of jurisdiction, therefore, must be subject to the same limitations that exist for exercises of government power generally.

Finally, the third proposition is that if one knows the content of general limitations on sovereignty, one can deduce the content of limitations on jurisdiction. This again seems self-evident. The problem is determining the content of the putative general limitations on state authority. Here the following discussion of cases will be instructive. Each case provides a set of circumstances that a court has held to be an improper exercise of state authority. Considering the cases together will permit the formulation of general rules defining what activities are beyond a state's geographical reach. From the general rules, particular rules dealing with jurisdiction can be deduced. The conclusion that emerges from this analysis is that a state may only assert jurisdiction over an absent nonresident defendant if the defendant's liability in the suit arises out of events or things within the state. The analysis also demonstrates, however, that a defendant's intent to have contacts with the state is irrelevant.

37. *See infra* notes 40-105 and accompanying text.

38. For a discussion of the argument that ultra vires analysis of assertions of personal jurisdiction is fundamentally unsound in light of precedent, and contrary to language in *Insurance Corp. of Ireland*, see *infra* notes 114-127 and accompanying text.

A. Local Action Rule

The cases upholding the "local action rule" provide an excellent example of a line of decisions in which state assertion of authority was held unlawful due to territorial limits on state authority. The local action rule provides that the courts of one state cannot directly affect title to real property located in another state.[39] Since *Massie v. Watts*,[40] courts have universally held that only the court of the situs could affect title.[41] Consequently, a court of one state may not decide that a deed to land in another state is void;[42] a court in one state may not empower an individual to convey land elsewhere[43] or transfer title to land in another state by its own decree;[44] and a probate court may not pass on questions of descent of land in another state.[45] Decisions violating the local action rule are not entitled to full faith and credit in the courts of the situs.[46]

Courts have justified the local action rule as an aspect of the basic notion that the law of the situs must control all questions relating to ownership and transfer of local land.[47] In *Clarke v. Clarke*,[48] the

39. Livingston v. Jefferson, 15 F. Cas. 660 (C.C.D. Va. 1811) (No. 8411). Disagreement exists about which actions are local and which transitory, Reasor-Hill Corp. v. Harrison, 220 Ark. 521, 249 S.W.2d 994 (1952). It is clear, however, that suits to enforce land contracts to convey land are transitory, Steele v. Bryant, 132 Ky. 569, 116 S.W. 755 (1909); Putnam & Norman Ltd. v. Conner, 144 La. 231, 80 So. 265 (1918); Gardner v. Ogden, 22 N.Y. 327 (1860).

40. 10 U.S. (6 Cranch) 148 (1810).

41. *See, e.g.*, Northern Ind. R.R. v. Michigan Cent. R.R., 56 U.S. (15 How.) 233 (1853); Watts v. Waddle, 31 U.S. (6 Pet.) 389 (1832); Launer v. Griffin, 60 Cal. App. 2d 659, 141 P.2d 236 (1943); Courtney v. Henry, 114 Ill. App. 635 (1904); Cooper v. Hayes, 96 Ind. 386 (1884); Gaskins v. Gaskins, 311 Ky. 59, 223 S.W.2d 374 (1949); Union Nat'l Bank v. State Nat'l Bank, 155 Mo. 95, 55 S.W. 989 (1900); *In re* Heirship of Robinson, 119 Neb. 285, 228 N.W. 852 (1930); Johnson v. Dunbar, 114 N.Y.S.2d 845 (1952), *aff'd*, 282 A.D. 720, 122 N.Y.S.2d 222 (1953), *aff'd*, 306 N.Y. 697, 117 N.E.2d 801 (1954); *In re* Estate of Ray, 74 Wyo. 317, 287 P.2d 629 (1955).

42. Carpenter v. Strange, 141 U.S. 87 (1891); Davis v. Headley, 22 N.J. Eq. 115 (1871).

43. Watkins v. Holman, 41 U.S. (16 Pet.) 25 (1842); Beach v. Youngblood, 215 Iowa 979, 247 N.W. 545 (1933); Decker v. Hickman, 116 Okla. 65, 243 P. 516 (1925); Wilson v. Braden, 48 W. Va. 196, 36 S.E. 367 (1900).

44. Fall v. Eastin, 215 U.S. 1 (1909); City Ins. Co. v. Commercial Bank, 68 Ill. 348 (1873); Cooley v. Scarlett, 38 Ill. 317 (1865); McRary v. McRary, 228 N.C. 714, 47 S.E.2d 27 (1948).

45. Clarke v. Clarke, 178 U.S. 186 (1900); *In re* Estate of Reed, 233 Kan. 531, 664 P.2d 824 (1984).

46. *In re* Clarke, 70 Conn. 195, 39 A. 155 (1898), *aff'd sub nom.* Clarke v. Clarke, 178 U.S. 186 (1900); Pritchard v. Henderson, 18 Del. 553, 47 A. 376 (1900); Norris v. Loyd, 183 Iowa 1056, 168 N.W. 557 (1918); *In re* Estate of Reed, 233 Kan. 531, 664 P.2d 824 (1984); *but see* Robertson v. Pickrell, 109 U.S. 608 (1883); Applegate v. Brown, 344 S.W.2d 13 (Mo. 1961); Welch v. Trustees of the Robert A. Welch Found., 465 S.W.2d 195 (Tex. Civ. App. 1971).

47. Hood v. McGehee, 237 U.S. 611 (1915); DeVaugh v. Hutchinson, 165 U.S. 566 (1897); Brine v. Insurance Co., 96 U.S. 627 (1877); United States v. Crosby, 11 U.S. (7 Cranch) 115 (1812).

Supreme Court held that a South Carolina probate decree that purported to adjudicate title to Connecticut land was not entitled to full faith and credit in Connecticut. The Court stated:

> [I]t is said . . . in such a case, not the will but the decree of the South Carolina court, construing the will, is the measure of the rights of the parties, as to real estate in Connecticut. The proposition, when truly comprehended, amounts but to the contention that the laws of the respective States controlling the transmission of real property by will, or in case of intestacy, are operative only so long as there does not exist in a foreign jurisdiction a judgment or decree which in legal effect has changed the law of the situs of the real estate. This is but to contend that . . . the fundamental principle which gives to a sovereignty an exclusive jurisdiction over the land within its borders is in legal effect dependent upon the non-existence of a decree of court of another sovereignty determining the status of such land. Manifestly, however, an authority cannot be said to be exclusive, or even to exist at all, where its exercise may be thus frustrated at any time.[49]

The Court further held that the land was beyond the subject-matter jurisdiction of the South Carolina courts.[50] It is important to stress that the *Clarke* Court offered no policy justifications for its result. Rather, it simply made clear that South Carolina had attempted to control Connecticut land. The Court treated the result as inevitable, simply because that judgment sought to affect land in another state. Significantly, all claimants to the land were South Carolinians. Nonetheless, South Carolina's inability to directly affect Connecticut was taken as given. The cases applying the local action rule, therefore, support the proposition that a state is without authority to regulate at least one category of transactions taking place outside its borders—those involving land title. This lack of authority, further, derives simply from the fact of the land's foreign location.[51]

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48. 178 U.S. 186 (1900).

49. *Id.* at 191-92.

50. *Id.* at 193.

51. The only possible exception to this principle involves equitable decrees purporting to adjudicate rights to foreign land in transitory actions, for example, suits that may be brought in any one of several places. *See supra* note 39. It is generally conceded that a court of equity may order a litigant appearing before it to make a conveyance of foreign land, and that a conveyance made in such circumstances is effective if the question arises in an action not dealing directly with title. *Steele, supra* note 39; *Putnam & Norman, supra* note 39; *Gardner, supra* note 39. Given this willingness to honor deeds made pursuant to a foreign decree, some commentators argue that the decree itself should be enforceable in the state where the land lies if the defendant refuses to make a deed. Alternatively, writers urge that the operation of collateral estoppel should settle the legal issues between the parties. Barbour, *The Extra Territorial Effect of the Equitable Decree*, 17 MICH. L.

This line of cases provides an example of what constitutes extra-terri-

REV. 527 (1919); Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620 (1954); Lorenzen, *Application of Full Faith and Credit Clause to Equitable Decrees for the Conveyance of Foreign Land*, 34 YALE L.J. 591 (1925); Reese, *Full Faith and Credit to Foreign Equity Decrees*, 42 IOWA L. REV. 183 (1957). Accordingly some courts either enforce such decrees or give them estoppel effect as a matter of full faith and credit. Day v. Wiswall, 11 Ariz. App. 306, 464 P.2d 626 (1970); Barber v. Barber, 51 Cal. 2d 244, 331 P.2d 628 (1958) (accepting principle but refused to enforce decree because rendering court, under its own law, was incompetent to affect California realty); Rozan v. Rozan, 49 Cal. 2d 322, 317 P.2d 11 (1957); Cuevas v. Cuevas, 191 So.2d 843 (Miss. 1966); Farley v. Farley, 19 Utah 2d 301, 431 P.2d 133 (1967); Bailey v. Tully, 242 Wis. 226, 7 N.W. 2d 837 (1943). *But see* Noble v. Noble, 26 Ariz. App. 89, 546 P.2d 358 (1976); Farley v. Farley, 227 Cal. App. 2d 1, 38 Cal. Rptr. 357 (1964) (accepting principle but holding judgment in question not entitled to enforcement); Rozan v. Rozan, 129 N.W.2d 694 (N.D. 1964). Other courts reach the same results on grounds of comity. *See, e.g.*, Matson v. Matson, 186 Iowa 607, 173 N.W. 127 (1919); Arthur v. Arthur, 625 S.W.2d 592 (Ky. App. 1981); McElreath v. McElreath, 162 Tex. 190, 345 S.W.2d 722 (1961). Other courts continue to treat foreign land decrees as nullities. *See, e.g.*, Wayne v. Reynolds, 125 So.2d 223 (La. App. 1960); McLam v. McLam, 85 N.M. 196, 510 P.2d 914 (1973); Rozan v. Rozan, 129 N.W.2d 694 (N.D. 1964). It is not clear what effect such decrees ought to have. None of the cases or articles have addressed any situation other than an order to convey land. None question the orthodox teaching that a foreign court may not affect title itself. All stress the effectiveness of a foreign court-ordered conveyance if the defendant made the conveyance. Authors and courts rejecting the traditional rule argue that by giving effect to the conveyance, force is given to the decree. Thus, they insist that failure to give effect to the decree absent the conveyance exalts form over substance.

The counterargument, however, reflects the realities of the situation. The dilemma is raised because the land and the defendant are in different states. A balance must be struck between the power of the court of the land's location to control the land and the power of the court of the defendant's location to control the defendant. Giving effect to the conveyance merely lets a court compel the defendant to do what he is permitted to do by the law of the situs—transfer land by a conveyance made elsewhere. This equitable power to compel a conveyance made elsewhere assumes that the state of the situs will permit such land transfers. If the situs required all transfers to be executed within its borders, no extraterritorial conveyance, whether judicially compelled or not, would be valid. *Cf.* McCormick v. Sullivant, 23 U.S. (10 Wheat.) 192 (1825) (upholding Ohio's refusal to recognize rights in Ohio land under a will probated in Pennsylvania in light of an Ohio statute forbidding transfer of land by will unless the will was probated in Ohio). Thus, more accurately, the issue is whether a facially valid conveyance will be rejected because a foreign court compelled it, and not whether acceptance of the conveyance amounts to enforcing a foreign equitable decree.

The only basis that proponents of the enforcement of decrees suggest for a rejection of such a conveyance is that the conveyance would be void for duress if compelled by a court whose decree "did not deal rightfully and constitutionally with the title to domestic land." Barbour, *supra*, at 549. The only authority that Professor Barbour cited for this proposition was Gilliland v. Inabnit, 92 Iowa 46, 60 N.W. 211 (1894), in which the court *upheld* a conveyance of Iowa land executed under compulsion of a Kentucky court. The Iowa court relied on Massie v. Watts, 10 U.S. (6 Cranch) 148 (1810), and stressed that the Kentucky suit was not in rem as to Iowa land, but was to enforce a personal obligation of the defendant who was subject to Kentucky's personal jurisdiction. The *Gilliland* court determined that the foreign court did not affect the title in question, but only compelled an individual subject to its jurisdiction to do something that he was entitled to do by the law of the situs, *i.e.*, execute a deed. The court did not consider any question other than the in personam character of the suit and the Kentucky court's jurisdiction over the defendant. Thus, Professor

torial action: a judicial decree that purports to affect the title to land

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Barbour's reliance on *Gilliland* for his assertion that the foreign court dealt "rightfully and constitutionally with the title" is misplaced; because *Gilliland* was his sole authority for that assertion, his assertion is questionable.

Interestingly, in this context the duress notion implies that regular legal proceedings against a defendant subject to a court's jurisdiction can be labeled unlawful coercion by another court—an idea that reverses full faith and credit. If the duress objection is rejected, however, Professor Barbour has no answer to the argument that the conveyance, not the decree, works the transfer, and that recognizing the conveyance does not require recognizing the decree. Barbour, *supra*, at 549. *See also* Currie, *supra*, at 628-29. Professor Lorenzen also asserts that recognizing the deed must imply an ability in the coercing court to affect title, but he did not address the argument that recognition only acknowledges the defendant's power to convey and the foreign court's power to control the defendant. Lorenzen, *supra*, at 608.

No commentators supporting enforcement of foreign land decrees answer the question raised when foreign decrees violate local law or policy. Professor Currie suggests that the state could act to divest a defendant after enforcing the decree in his favor, but refers only to a single class of cases—those in which a defendant lacks capacity. Currie, *supra*, at 632-34. Professor Lorenzen suggests that the problem is no different from that created by a conveyance pursuant to a decree incorrectly reading local policy, but ignore the fact that the traditional rule forbids extraterritorial suits in most cases. Lorenzen, *supra*, at 610. This rule necessarily means that such conveyances will issue only in cases that are not local actions. Professor Reese merely relied on Professor Currie. Reese, *supra*, at 200.

Most fundamentally, the scholars ignore the basic difference between equitable nonmoney decrees and judgments. When a state enforces a foreign judgment, it does so according to its own law. Local law determines the manner of obtaining an execution and its consequences. The only real consequence of the full faith and credit clause is that foreign judgments, once converted into local judgments, are entitled to whatever consequences that the state has decided should follow from judgments. Enforcing a foreign nonmoney equity decree, however, must have consequences on the ground in the enforcing state that a foreign court will determine. The foreign determination does not merely trigger an execution process whose incidents are determined locally; it also dictates a particular result. In effect, the foreign judge is deciding what particular events should happen within the enforcing state. With respect to a money judgment, the foreign court determines only that such enforcement processes as the enforcing state has chosen shall be triggered. Given that distinction, it is defensible for a state to limit its respect for foreign court actions to those producing conveyances permitted by local law. Any other approach raises Dean Pound's question: "The result is to allow one state through its courts to create real rights in land in another state—and if it may do so by its courts, why not through its legislature?" Pound, *The Progress of the Law 1918-1919: Equity*, 33 HARV. L. REV. 420, 424-25 (1920).

Professor Currie responds that a state is permitted to interpose its own public policy to avoid enforcing foreign statutes but not foreign judgments. Currie, *supra*, at 660. The rationale for denying public policy exceptions as to judgments, Fauntleroy v. Lum, 210 U.S. 230 (1908), while permitting them as to statutes, however, may well be that local policy on execution determine in-state consequences of enforcing a foreign judgment. Deference to foreign statutes eliminates any aspect of local policy as to behavior in the state. Thus, foreign equitable decrees that dictate local behavior resemble statutes far more than they resemble judgments.

Interestingly enough, none of the writers arguing for the effectiveness of foreign decrees contend that they may take effect without local court action. Barbour, *supra*, at 548; Currie, *supra*, at 672; Reese, *supra*, at 198. Similarly, courts calling foreign decrees effective acknowledge the need for local court action. Rozan v. Rozan, 49 Cal. 2d 322, 317 P.2d 11 (1957); Arthur v. Arthur, 625

located in another state. Such decrees can have consequences within the forum state as well, for example, if all claimants are residents of the forum state.[52] But the courts treat any effects within the forum state as incidental. The title transfer is the central issue. Whatever interest that another state or its citizens may have in the land cannot affect the state's authority to transfer the land through its courts.

B. Antisuit Injunctions

A second line of cases holding that a state lacks authority to control events beyond its borders is that involving antisuit injunctions. Antisuit injunctions forbid a particular individual to sue on a particular matter. If a court of a state different from the forum state issues an antisuit injunction, the forum court typically does not consider itself bound by the full faith and credit clause to dismiss the suit.

The Illinois Supreme Court explained the rationale for this exception to full faith and credit in *James v. Grand Trunk Western Railroad.*[53] First, the court noted that another state's statute limiting litigation of transitory actions to its own courts was unconstitutional.[54] The statutes of one state cannot take away a second state's jurisdiction, even when the first state created the original right of action.[55] The *James* court further noted that if statutes circumscribing the export of causes of action would not be given extra-territorial effect, "it is hard to see why an equity decree should be entitled to any greater recognition."[56] The court permitted a Michigan administrator who was seeking recovery under the Michigan Wrongful Death Act to continue her suit in Illinois court against an Illinois organization based on decedent's death in Michigan, notwithstanding a Michigan antisuit injunction.[57]

S.W.2d 592 (Ky. App. 1981); Cuevas v. Cuevas, 191 So. 2d 843 (Miss. 1966); McElreath v. McElreath, 162 Tex. 190, 345 S.W.2d 722 (1961); Bailey v. Tully, 242 Wis. 226, 7 N.W.2d 837 (1943). Furthermore, the crux of the disagreement over such decrees is whether they more closely resemble money judgments or legislation. *See, e.g.*, Pound, *supra*, at 424-25. Proponents of recognition of the decrees do not so much deny the impropriety of foreign legislation concerning local land as they reject the analogy between legislation and the decrees. *See* Currie, *supra*, at 660.

52. *See, e.g.*, Clarke v. Clarke, 178 U.S. 186 (1980) (all claimants to the Connecticut land were residents of South Carolina).

53. 14 Ill. 2d 356, 152 N.E.2d 858 (1958).

54. *Id.* at 367, 152 N.E.2d at 864 (citing Tennessee Coal, Iron & R.R. Co. v. George, 233 U.S. 354 (1914); Atchison, Topeka & Sante Fe Ry. v. Sowers, 213 U.S. 55 (1909)).

55. 233 U.S. at 360.

56. *Id.*

57. *Id.* at 357-67, 152 N.E.2d at 859-64.

Similarly, in *Abney v. Abney*[58] the Indiana Court of Appeals upheld the trial court's retention of jurisdiction over a divorce action despite a Tennessee decree enjoining plaintiff from seeking an Indiana divorce because he failed to comply with a Tennessee separate maintenance order. The court noted the unanimity of the authorities on this point,[59] and observed that each state "has a legitimate interest in determining for itself the fairness or unfairness of any resort to its courts."[60] The court also stated that the Supreme Court had upheld the jurisdiction of states to grant divorces to nonresidents, and argued that another state's antisuit injunction should not destroy this power.[61]

The rationale of these cases resembles that of the local action cases. Recognition of the foreign decree is seen as foreign control of local judicial process. The courts assume that such control is improper and that the foreign decree is not enforced. The courts held that a state's interest in controlling litigation before its own courts and affecting its residents is inadequate to permit one state to exercise authority over the courts of another state. The key question is where the injunction would take effect. Because the legal consequence is felt exclusively outside the forum state, the forum state is without authority that another state must respect.[62]

C. Tax Jurisdiction Cases

Tax cases dealing with territorial limits on state jurisdiction are useful to this analysis for three reasons. First, they provide another instance of state assertions of authority being held unlawful because of their extra-territorial character. Second, the cases illustrate the connection between an ultra vires analysis of extra-territorial state actions and the due process clause. Third, originally at least, the courts expressly framed their results in terms of limits on state power generally, not simply in terms of

58. 176 Ind. App. 22, 374 N.E.2d 264 (1978), *cert. denied*, 439 U.S. 1069 (1979).

59. *Id.* at 25-28, 374 N.E.2d at 267-68.

60. *Id.*

61. *Id.*

62. One may ask why injunctions against suits in other states are not considered void as beyond the authority of the enjoining court. They are not so considered because the enjoining court has authority over the defendant, and thus in a proper case can seek to control his conduct outside the state. Bethell v. Peace, 441 F.2d 495 (5th Cir. 1971). The state where the litigation is taking place may deny the injunction full faith and credit because of its authority over its judicial proceedings. Such a situation does not present a complete lack of authority in the enjoining state, but presents a conflict of authority. The injunction therefore may be imprudent, but is not void.

limits on tax jurisdiction, thus providing *explicit* support for the idea that all assertions of state authority are subject to territorial limitations.

Tax laws that apply to out-of-state property or activity violate the due process clause.[63] In *Moorman Manufacturing Co. v. Bair*,[64] the Supreme

63. Determining whether property is within the state is not always easy. Realty presents no difficulty; a state's taxing power can be applied only to land within its borders. Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 204 (1905). Tangible personal property is treated as located at the domicile of the owner, unless it is affirmatively shown to have acquired a situs elsewhere. Central R.R. of Pa. v. Pennsylvania, 370 U.S. 607 (1962). If the property is shown to have been permanently located outside the domiciliary state, however, it may be taxed only at its location. Frick v. Pennsylvania, 268 U.S. 473 (1925). This approach to the location of these kinds of property for tax purposes is consistent with the approach taken to locating such property in other areas of the law. Thus, the local action rule requires that questions of realty title be adjudicated in the state of location that is also the tax situs. *See supra* notes 39-51 and accompanying text. Similarly, just as tangible personalty is taxed at its location, the state of its location controls its descent and distribution upon the death of the owner. *See* City Bank Farmers Trust Co. v. Schnader, 293 U.S. 112 (1934).

Complications arise, however, as to intangible property. The courts have long recognized that because such "property" is simply the reification of relationships between people, it can have no situs in fact. Severnoe Sec. Corp. v. London & Lancashire Ins. Co., 255 N.Y. 120, 174 N.E. 299 (1931). The courts have therefore been willing to acknowledge that an intangible may have more than one situs. For example, corporate stock may be taxed at the state of the corporation's domicile, *In re* Bronson, 150 N.Y. 1, 44 N.E. 707 (1896); or at the place at which the stock certificates are located, *In re* Estate of Maslowe, 119 Ill. App. 3d 776, 457 N.E. 2d 151 (1983); or at the owner's domicile, Curry v. McCanless, 307 U.S. 357 (1939); or at all three places, State Tax Comm. of Utah v. Aldrich, 316 U.S. 174 (1942). This situation as far as it goes raises no question as to the principle stated in the text because to tax intangibles is to tax a relationship, and relationships can touch more than one state simultaneously.

Taxation of intangibles raises important questions as to the premise of this Article, however, in light of rules regarding jurisdiction over intangibles for purposes other than taxation. Thus, in *In re* De Lano's Estate, 181 Kan. 729, 315 P.2d 611 (1957), the court held that Kansas was without power to administer that portion of a deceased Kansas domiciliary's estate that consisted of accounts in Missouri banks and stock certificates and bonds physically in Missouri, though acknowledging Kansas' authority to tax the same property. This Article is premised on the assumption that state authority is essentially unitary, and that general rules of territorial limitation on state authority may be abstracted from particular instances of limitation. The cases dealing with intangibles acknowledge that state authority over an intangible for one purpose does not establish state authority for all purposes. It could be argued, therefore, that differing degrees of authority over intangibles show that authority is not unitary, and that the premise of this Article is false.

This argument is incorrect, however, because it does not reflect the particular characteristic of intangibles that produces the apparent inconsistency. As noted above, intangibles are, simply, relationships. Because a state is able to localize one aspect of a relationship for one purpose does not prove that a court could localize other aspects of the relationship for other purposes. Consider, for example, two different types of exercise of state authority, taxation and the administration of a decedent's estate. Taxation mechanically requires the state to send a tax notice and jurisdictionally requires a relationship between the taxed intangible and the state. Administration of an estate, however, requires the administrator, exercising state authority, to act officially at the place where acts necessary to possess the property can be taken. As the court observed in *De Lano*:

Court noted the two due process limitations on a state's power to tax interstate business: "First, no tax may be imposed unless there is some minimal connection between those activities and the taxing State. . . . Second, the income attributed to the State for tax purposes must be rationally related to 'values connected with the taxing State.' "[65] The state prevailed on the tax question in *Moorman*—whether the formula that Iowa used to determine the portion of a corporation's total income that was subject to Iowa's income tax was constitutional.

In *Norfolk & Western Railway v. Missouri State Tax Commission*,[66] however, the Court stated that imposition of an apportionment formula on appellant's property resulted in "gross overreaching, beyond the values represented by the values purported to be taxed."[67] The Court held that "[t]he taxation of property not located in the taxing State is constitutionally invalid, both because it imposes an illegitimate restraint on interstate commerce and because it denies to the taxpayer the process that is his due."[68] The result in *Norfolk & Western* supports the proposition that due process imposes limits on a state's power to tax and forbids taxation of property beyond state territory.[69] The cases indicate that consistency of the tax with due process turns on "whether the tax in

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> Administration of estates involves more than merely interpreting wills and decreeing the devolution of property. It also involves, among other things, the collection, inventory, appraisal and sale of assets and the determination and payment of creditor's claims. How is a Kansas domiciliary representative to collect a bank account held in a Missouri bank? How is such a representative to collect on a promissory note which is held by another in a different state? How is a bond to be collected when the certificate is not in Kansas? How is stock to be transferred without possession of the certificate? How are any of them to be inventoried and appraised in Kansas? Shall the domiciliary representative collect such assets through the medium of midnight forays into other states? He has no other alternative if other states, such as Missouri, choose to vest in their own courts control over such assets.

181 Kan. at 749, 315 P.2d at 626.

In short, the fact that a state's authority over given intangibles varies depending on the type of authority exercised does not undercut this Article. Rather, it reflects the fact that different types of authority touch on different aspects of the relationship that is the intangible, and that the state cannot necessarily characterize all aspects of that relationship as being within its borders merely because it can plausibly localize some elements of the intangible.

64. 437 U.S. 267 (1978).

65. *Id.* at 273. The Court relied on National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753, 756 (1967), for its first assertion, and on Norfolk & Western Ry. v. Missouri State Tax Comm'n, 390 U.S. 317, 325 (1968), for its second.

66. 390 U.S. 317 (1968).

67 *Id.* at 326.

68 *Id.* at 325.

69. For authority supporting this conclusion, see Standard Pressed Steel Co. v. Washington Dep't of Revenue, 419 U.S. 560 (1975); National Bellas Hess, Inc. v. Department of Revenue, 386

practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State."[70]

Thus, the tax jurisdiction cases assume that authority to tax is dependent upon a link between the object taxed and the territory subject to the taxing government. The determinative factor in these cases is the location of the item giving rise to liability, in this case the taxed property. Moreover, examination of the chain of authority upon which the modern due process tax decisions rest demonstrates that those decisions expressly rely on cases dealing with the issue of tax jurisdiction as an ultra vires problem.

The first links in the chain are *Hays v. Pacific Steamship Co.*[71] and *St. Louis v. The Wiggins Ferry Co.*[72] In *Hays* and *Ferry Co.*, the Supreme Court viewed territorial limitations on state taxing authority as inherent in the nature of the states' power and not simply as a function of the due process clause. *Hays* most clearly illustrates this point because it held a tax on out-of-state property to be beyond the state's jurisdiction fourteen years before the due process clause was added to the Constitution. In *Hays*, a New York steamship company sought recovery of taxes paid to a California tax collector. The taxes had been assessed against plaintiff's ships while they were in California to discharge passengers and cargo, refit, and pick up more passengers and cargo. The Supreme Court held that the tax was unlawful, observing that "the State of California had no jurisdiction over these vessels for the purpose of taxation; they were not, properly, abiding within its limits, so as to become incorporated with the other personal property of the State . . . . "[73]

Similarly, in *Ferry Co.*, the Supreme Court held that St. Louis was without power to tax the value of ferry boats whose situs was in Illinois. The Court concluded that jurisdiction to tax was limited by territorial concerns:

U.S. 753 (1967); American Oil Co. v. Neill, 380 U.S. 451 (1965); Miller Bros. v. Maryland, 347 U.S. 340 (1954); Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77 (1938).

70. *Norfolk & Western*, 390 U.S. at 325 n.5. In *Miller Brothers v. Maryland*, 347 U.S. 340 (1954), the Court spoke of "some definite link, some minimum connection, between a state and the person, property, or transaction it seeks to tax." *Id.* at 344-45.

71. 58 U.S. (17 How.) 596 (1854).

72. 78 U.S. (11 Wall.) 423 (1871), *cited in Miller Bros.* 347 U.S. at 342. *Norfolk & Western*, 390 U.S. at 324, relied on Fargo v. Hart, 193 U.S. 490 (1904), among others. *Fargo*, 193 U.S. at 499, relied on Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891). The *Car Co.* case, 141 U.S. at 23, relied on the *Hays* and *Ferry Co.* cases.

73. *Hays*, 58 U.S. (17 How.) at 599.

> Where there is jurisdiction neither as to person nor property, the imposition of a tax would be *ultra vires* and void. If the legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative as to valid judicial action.[74]

Even though *Ferry Co.* was decided three years after the fourteenth amendment was adopted, the Court's opinion made no reference to any "explicit Constitutional inhibition" that supported its result. The briefs in the case also did not connect the jurisdictional argument to due process.[75] *Railroad Co. v. Jackson*[76] was the only authority that the Courts cited supporting its holding that a state's tax on property outside the state was invalid,[77] and that case did not refer to the fourteenth amendment.[78]

These three tax cases, taken together, support the legitimacy of an ultra vires approach to the reach of state authority. *Hays* must have relied on such an approach because the fourteenth amendment did not yet exist. *Ferry Co.* and *Jackson* also did not rely on the fourteenth amendment although it was available. *Ferry Co.* explicitly used an ultra vires analysis, acknowledging no "explicit constitutional inhibition" to the tax in question, fourteenth amendment or no fourteenth amendment. The modern cases, on the other hand, label the problem as one of due process. The due process violation here, however, as with personal jurisdiction,

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74. 78 U.S. (11 Wall.) at 430.

75. Brief on Behalf of Plaintiff in Error; Brief for Defendant in Error, *Ferry Co.*, 78 U.S. (11 Wall) at 423.

76. 74 U.S. (7 Wall.) 262 (1868).

77. *Ferry Co.*, 78 U.S. (11 Wall) at 432.

78. *Jackson* involved the validity of a Pennsylvania tax imposed on bonds issued by a railroad that operated in both Pennsylvania and Maryland. The Court held that taxing the bonds amounted to taxing the property of the company issuing the bonds. *Jackson*, 74 U.S. (7 Wall.) at 267-68. The Court held that the tax was invalid because it "[gave] effect to the acts of the legislature of Pennsylvania upon property and interests lying beyond her jurisdiction." *Id.* at 268. The opinion did not refer to the fourteenth amendment even though the case was decided after the amendment's effective date. The arguments of counsel in *Jackson* did not rely on that amendment either, focusing instead on the British nationality of the bondholder and Pennsylvania's alleged lack of authority to tax a Maryland corporation. Brief for Plaintiff in Error at 3-6; Supplemental Brief for Plaintiff in Error at 1-3; Statement of Defendant in Error at 1-2, *Jackson*, 74 U.S. (7 Wall.) at 262.

lies in the state's improper claim to authority.[79]

Finally, the thrust of *Ferry Co.* is worth stressing. Clearly, to that court, what was in issue was not some doctrine peculiar to tax cases. Tax jurisdiction was seen simply as an aspect of a state's authority generally, and the Court expressly equated tax jurisdiction with judicial jurisdiction, in language the Supreme Court has relied on as recently as 1954.[80] Thus, in enunciating territorial limits on the taxing power, the Court applied a general restriction on state power to one of the manifestations of that power.[81]

D. Criminal Law

The area of criminal subject-matter jurisdiction also supports the argument that state authority is territorially limited. It further provides an especially helpful example of what constitutes extra-territorial state activity. A basic principle of American law is that a state may not punish nonresidents for crimes that they commit in other states.[82] Although

79. Professor Rheinstein noted this conclusion 30 years ago. Rheinstein, *The Constitutional Basis of Jurisdiction*, 22 U. CHI. L. REV. 775, 791-92 (1955).

80. *Miller Bros.*, 347 U.S. at 342.

81. This recognition of inherent territorial limits on state taxing power has implications for any consideration of similar limitations on state judicial power. Surprisingly, few of the commentators who have attacked a sovereignty-oriented analysis of jurisdiction address the implications of this circumstance. Professor Redish, however, did so, but concluded that the tax cases lend no support to such an analysis of personal jurisdiction.

Professor Redish's arguments offer various reasons to treat the sovereignty-oriented approach of the tax jurisdiction cases as not supporting a similar approach to personal jurisdiction. He asserts that there are "fundamental distinctions between [jurisdiction to tax] and the law of personal jurisdiction." Redish, *supra* note 5, at 1126. The reasoning of the tax jurisdiction cases, however, does not support this conclusion. On the contrary, in language relied on in *Miller Bros.*, 347 U.S. at 342, the *Ferry Co.* Court viewed jurisdiction to tax and judicial jurisdiction as different aspects of the same problem. 78 U.S. at (11 Wall) 430. Professor Redish also distinguishes taxing jurisdiction from personal jurisdiction by describing the results in the tax jurisdiction cases as "premised on the reasonableness of a state's action in depriving individuals of property." Redish, *supra* note 5, at 1129. If this is meant to suggest that this distinction justifies treating tax jurisdiction as raising different due process questions than personal jurisdiction, it is incorrect. To the extent that Professor Redish is suggesting that tax cases turn on reasonableness and personal jurisdiction cases do not, it must be stressed that the key element of "reasonableness" in tax jurisdiction analysis is the territorial link between the state and either the taxpayer, the property, or the transaction. *See supra* notes 64-70 and accompanying text. On the other hand, if Professor Redish's contention is that the deprivation of property is the key due process distinction between tax and judicial jurisdiction, his argument fails because the assertion of judicial jurisdiction is the assertion of state authority to compel a defendant to give up his property.

82. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 118 (1972). This limitation may not apply if the defendant is a citizen of the state. *See* Skiriotes v. Florida, 313 U.S. 69 (1941). It is unclear whether states are forbidden to impose criminal penalties on nonresidents for acts done

outside state territory but *not* in the territory of any other entity. In State v. Bundrant, 546 P.2d 530 (Alaska 1976), *appeal dismissed sub. nom.* Uri v. Alaska, 429 U.S. 806 (1976), the Alaska Supreme Court upheld, against a due process challenge, state statutes purporting to criminalize activities by non-Alaskans taking place on the seas beyond Alaska's territorial waters. The statutes regulated crab fishing in the areas in question, and could be violated by persons who never entered Alaska. Certain of the defendants in *Bundrant* in fact were not shown to have performed any act in Alaska, much less acts violating the statute. Nonetheless, the Court upheld the statute. The Court relied on cases in which the defendant was either a citizen of the state whose criminal law was in issue, or in which some element of the defendant's offense had occurred within the state, *e.g.*, the defendant had possessed within the state certain game in violation of a prohibition of possession within the state of game taken outside the state in violation of state hunting restrictions. In all the cases relied upon, the statutes were also justified as necessary to protect some clearly proper system of regulation, *e.g.*, prohibitions of possession of game at certain seasons were needed to implement a state law limiting local hunting seasons, because game taken in state could always be described as having been taken elsewhere. *See* Silz v. Hesterburg, 211 U.S. 31 (1908). The Court emphasized the Supreme Court's apparent acknowledgement in United States v. Alaska, 422 U.S. 184 (1975), of the authority of a coastal state to regulate fishing in the high seas adjacent to its territorial sea. The Court concluded that Alaska's statute was justified as a conservation statute necessary to preserve an in-state resource.

There are a number of difficulties with *Bundrant*. Unlike the conservation cases relied upon, the amount of crab fishing within Alaska's territorial waters was apparently small; the crabs passed the early portion of their life cycles close to shore. The crabs migrated further out to sea as they matured, not becoming commercially exploitable until they were at a stage of life typically spent beyond Alaska's waters. The activity that the state sought to regulate, though very important to Alaska, took place almost entirely on the high seas, and thus differs from the cases *Bundrant* cites, in which the focus of regulation was an in-state activity. Further the court does not consider the significance of the fact that *all* the other cases involved either citizens of the prosecuting state or offenses, one element of which took place within the prosecuting state.

One should also note that the court in Hjelle v. Brooks, 377 F. Supp. 430 (D. Alaska 1976), disagreed with the Alaska Supreme Court as to the constitutionality of the provisions. *Hjelle*, a three-judge court decision granting a preliminary injunction against enforcement of the regulations in *Bundrant*, held that the true purpose of the regulations was to regulate fishing outside Alaska, because the actual amount of taking of crabs within Alaskan waters was very small. Given that fact, the court held that the nexus between Alaska and the regulated activity was likely to be too weak to withstand due process and commerce clause objections. *Hjelle* never proceeded to trial; proceedings were stayed to allow the Alaska Supreme Court to deal with the *Bundrant* case, and *Hjelle* was dismissed after *Bundrant* on the grounds that the two cases involved essentially the same parties and the plaintiffs were not entitled to relitigate issues already decided in *Bundrant*. Hjelle v. Brooks, 424 F. Supp. 595 (D. Alaska 1976).

In light of the distinctions between the facts of *Bundrant* and the facts of the cases on which it relies, and in light of the conflicting results of *Bundrant* and the first *Hjelle* case, it is doubtful whether *Bundrant* was correctly decided. Assuming that it was, it does not conflict with the rule stated in the text. *Bundrant* applied Alaskan law to acts on the high seas, *i.e.*, an area not within the jurisdiction of any other state, American or foreign. Further, as *Bundrant* noted in its quotation from *United States v. Alaska*, it is true that, as a matter of public international law, the authority of coastal states to exercise a *limited* jurisdiction on the high seas adjacent to their territorial seas has long been recognized. Church v. Hubbart, 6 U.S. (2 Cranch) 187 (1804). In effect, a coastal nation is permitted *for some purposes* to treat areas of the sea adjacent to its territory as though it were a part of its territory, and one of those purposes is fishing. *See* Fisheries Jurisdiction Case (U.K. v. Ice.) 1974 I.C.J. 3; Art. 56, United Nations Convention on The Law of The Sea, December 10, 1982,

numerous cases assert the principle,[83] the courts do not always state whether the rule is one of construction only, inoperable in the event of a clear legislative directive to the contrary,[84] or one that follows from state or federal constitutional limits.[85] Because states seldom seek to try persons for acts done elsewhere, the occasions for courts to pass on the question are limited. Authority nevertheless supports the proposition that a state lacks the authority to criminalize activity within another jurisdiction. The cases asserting this rule have concluded that the state lacks authority because the activity was outside the state's boundaries.[86]

For example, in *State v. Cutshall*,[87] the defendant had been convicted under a statute that made bigamy a felony, even if the second marriage occurred outside the state.[88] The second marriage in *Cutshall* had taken place in South Carolina. The court held that North Carolina lacked power to criminalize marriages in South Carolina. The court in part rested its conclusion on a defendant's right, under North Carolina's Constitution, to a jury drawn from the vicinage in which the crime occurred.[89] The right was denied by the statute because the North Carolina courts could not empanel juries from South Carolina.[90] The court held that this denial of the "jury of the vicinage" right to a citizen of South Carolina violated the privileges and immunities clause of the federal constitution.[91] This argument was based on limitations on North Carolina's power imposed by its own law. The court, however, did not rest its decision solely on this ground. It rejected, as a matter of basic principles, the idea that a state could try an individual for an act done

21 I.L.M. 1261. Thus one could arguably see the area involved in *Bundrant* as part of Alaska for *some purposes*.

83. People v. Buffum, 40 Cal. 2d 709, 256 P.2d 317 (1953); People v. Devine, 185 Mich. 50, 151 N.W. 646 (1915); State v. Kief, 12 Mont. 92, 29 P. 654 (1892); *Ex parte* McNeely, 36 W. Va. 84, 14 S.E. 436 (1892). International law recognizes a piracy exception, between sovereign nations, to this rule. Under this exception, any nation may capture pirates on the high seas whatever their nationality. I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 243-44 (1979). In the United States, however, the power to punish pirates is committed exclusively to the federal government. *See* United States v. Flores, 289 U.S. 137, 147-50 (1933).

84. *See* People v. Buffum, 40 Cal. 2d 709, 256 P.2d 317 (1953).

85. *See infra* notes 86-103 and accompanying text.

86. This rule appeared as early as 1799. State v. Knight, 1 N.C. (Tay.) 44 (1799).

87. 110 N.C. 538, 15 S.E. 261 (1892).

88. *Id.* at 540, 15 S.E. at 261.

89. *Id.* at 543-44, 15 S.E. at 262.

90. *Id.*

91. *Id.* at 550, 15 S.E. at 264.

elsewhere.[92]

State v. Baldwin[93] echoes the reasoning of *Cutshall*. In *Baldwin*, the Maine Supreme Judicial Court considered a rape case in which the state's evidence did not establish beyond a reasonable doubt that the rape had occurred in Maine.[94] The court referred to state statutes and case law for the proposition that Maine's penal laws could not be applied to acts occurring outside Maine,[95] but also asserted that other states would not be obliged to give full faith and credit to Maine's judgments if the defendant's acts had not taken place in Maine.[96] The Court concluded that a person who had been convicted and had served a sentence in Maine for a criminal act performed elsewhere could not plead double jeopardy if the state in which the crime actually had occurred subsequently indicted him.[97]

Finally, the Supreme Court appears to have sanctioned the rule limiting application of a state's criminal law to acts within the state in *Neilsen v. Oregon*.[98] In *Neilsen*, the defendant, a Washington resident, operated a purse net on the Washington side of the Columbia River, which forms the boundary between Washington and Oregon, pursuant to a license issued by Washington authorities. Defendant was arrested and convicted in Oregon of violating that state's prohibition on purse nets. Oregon based its jurisdiction on the act of Congress admitting it to the Union. The act conferred upon Oregon "concurrent jurisdiction" with any other

92. *Id.* at 543-45, 15 S.E. at 262-63. The court also noted that the extradition clause of the federal constitution "excluded the idea of trying [defendants] outside of the limits of the state where the offense is committed." *Id.* at 551-52, 15 S.E. at 265. The 1862 Indiana case of Johns v. State, 19 Ind. 421 (1862), also addressed the question whether an individual whose actions amounted to those of an accessory before the fact to a felony committed in Indiana, but who never entered Indiana, could be held to Indiana's laws. In reversing a judgment for conviction, the court held:

> Each State, in respect to each of the others, is an independent sovereignty, possessing ample powers, and the exclusive right, to determine, within its own borders, what shall be tolerated, and what prohibited; what shall be deemed innocent, and what criminal; its powers being limited only by the Federal Constitution, and the nature and objects of government. While each State is thus sovereign within its own limits, it can not impose its laws upon those outside of the limits of its sovereign power. Our own constitution has expressly fixed the boundaries of its sovereignty.

Id. at 424.

93. 305 A.2d 555 (Me. 1973).

94. *Id.* at 557. The rape occurred in a remote area in the vicinity of the Maine-New Hampshire border.

95. *Id.* at 559.

96. *Id.* at 560.

97. *Id.*

98. 212 U.S. 315 (1909).

states that might be formed bordering the Columbia.[99]

The Supreme Court held that Oregon could not prosecute an individual who was not a resident of Oregon for an act authorized by the place of acting, notwithstanding the congressional grant of concurrent jurisdiction.[100] The Court's reasoning, however, is not clear. The result has two possible explanations. First, the Court conceivably could have interpreted the statute admitting Oregon to the union as limiting the state's authority. Alternatively, the Court could have decided that the statute simply did not apply to the situation; if so, it must have based its decision on its belief that limits on state power exist wholly apart from statute.

The latter explanation is most consistent with the opinion. The Court phrased the issue as whether "Oregon, by virtue of its concurrent jurisdiction . . . [can] practically override the legislation of Washington . . . ?"[101] The Court did not view the statute as limiting Oregon's jurisdiction, but instead viewed it as a possible source of jurisdiction. Therefore, the Court's holding that even the congressionally augmented jurisdiction of Oregon could not reach the defendant a fortiori requires the conclusion that the Court believed that Oregon was unable to punish extraterritorial criminal acts through its normal jurisdiction.

Unfortunately, the Court did not explain why this was true, and identified no express constitutional prohibition on Oregon's action. Rather, the Court simply noted the potential for conflict between the two states as follows:

> It is not at all impossible that in some instances the interests of the two States may be different. Certainly, as appears in the present case, the opinion of the legislatures of the two States is different, and the one State cannot enforce its opinion against that of the other, at least as to an act done within the limits of that other State.[102]

A state, therefore, lacks authority to punish crimes committed beyond its borders. This rule is implied in *Cutshall*, and is the most logical explanation for *Neilsen*. *Baldwin* also must be understood in this sense, because its argument that a Maine conviction for a crime committed elsewhere would not be entitled to full faith and credit must mean that the Maine court saw the territorial requirement as jurisdictional. If the location of the crime was irrelevant to Maine criminal jurisdiction, then the

99. *Id.* at 316.
100. *Id.* at 321.
101. *Id.*
102. *Id.*

conviction presumably would be entitled to full faith and credit.[103]

The question remains to be determined when a crime is committed within the territory of a particular state. Obviously, different parts of a crime can occur in more than one state, for example, Smith standing in state A shoots Jones standing in state B. The modern rule is that a state where any part of the crime occurs has jurisdiction to try the criminal; the fact that effects of the crime are felt within the state does not provide a basis for jurisdiction if the effect is not a part of the crime.[104] Nor is the defendant's awareness of the locus of the crime important. Apparently, the state must only prove that the crime occurred in the state; proof that the defendant intended the crime to take place in the state, or was aware of its locus, is not required.[105]

E. Implications

The foregoing discussion makes clear that, with respect to a number of areas of the law, the Supreme Court views the states or the states view themselves as unable to take actions that would amount to exercising authority over matters not concerned with their territory. These cases are concrete examples of territorial limitations on state sovereignty. The question now becomes that of identifying the general limitations on state sovereignty and the specific limitations on the exercise of personal jurisdiction.

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103. The law of extradition, under which one state may not be compelled to extradite a fugitive to another state reinforces this view. Kentucky v. Dennison, 65 U.S. 66 (1860); South Dakota v. Brown, 144 Cal. Rptr. 758, 576 P.2d 473 (1978).

104. State v. Duffy, 124 Ariz. 267, 603 P.2d 538 (Ct. App. 1979); Gardner v. State, 263 Ark. 739, 569 S.W.2d 74 (1978), *cert. den.*, 440 U.S. 911 (1979); Conrad v. State, 262 Ind. 446, 317 N.E.2d 789 (1974); Commonwealth v. Bighum, 452 Pa. 554, 307 A.2d 255 (1973); State v. Klein, 4 Wash. App. 736, 484 P.2d 455 (1971). Cases sometimes state that a state also has jurisdiction if the effects of the defendant's acts are felt within the state. Examination of such cases reveals, however, that the effect referred to is itself a part of the crime. Strassheim v. Daily, 221 U.S. 280, 284 (1911) (crime is obtaining money from state government by false pretenses through delivery of used instead of new machinery; delivery in state); Commonwealth v. Carroll, 360 Mass. 580, 276 N.E.2d 705 (1971) (crime is larceny, defined as including asportation; stolen money possessed in state); State v. Darroch, 305 N.C. 196, 287 S.E. 2d 856 (1982), *cert. den.*, 457 U.S. 1138 (crime is accessory before the fact to murder; murder in state). Thus an older New York case holds as not within New York's jurisdiction a fraud committed in London upon a branch of a New York corporation. People v. Werblow, 241 N.Y. 55, 148 N.E. 786 (1925). The fact that the New York firm ultimately bore the loss was held inadequate to make the fraud one "affect[ing] persons or property" within New York. *Id.* at 67-68, 148 N.E. at 791-92.

105. State v. Vickers, 18 Wash. App. 111, 567 P.2d 675 (1977) (crime committed on bridge between Washington and Oregon; Washington jurisdiction upheld with evidence offered only on locus of crime).

At a minimum, the foregoing examples strongly suggest that courts understand that territorial considerations limit state sovereignty. All of the limitations on state authority trace back to the common basic principles that the sovereignty of other states limits a state's authority and that a state's authority extends only to that which affects its territory. Thus the local action rule is a manifestation of a state's sovereign authority to control local land. Foreign antisuit injunctions are denied full faith and credit as interferences with a state's control of its own courts. The Supreme Court expressly couples authority to tax with authority to assert judicial jurisdiction and territorial considerations. Criminalization by one state of acts within another state's territory is an effort to ignore the sovereignty of the other and is therefore beyond the power of the first state. Reading these areas of the law together clearly reveals a common basic principle: a state's authority is limited to controlling transactions, things and people connected with its territory.

Given this general principle, the assertion that territorial considerations limit personal jurisdiction follows. An assertion of personal jurisdiction is an assertion of authority. The state does not simply invite defendants to participate in a civil suit; it orders them to do so. Furthermore, the assertion of authority extends beyond compelling the defendant to litigate; the state claims the authority to decide the legal effects of particular acts or omissions. In effect, by asserting jurisdiction, the state is claiming authority to regulate the transaction that is the subject of the lawsuit. Because the state is exerting its authority when it asserts personal jurisdiction over a defendant and because examination of other areas of the law reveals an underlying assumption that a state may not exercise authority over people or events not connected with its territory, it follows that territorial limitations on sovereignty apply to the exercise of personal jurisdiction.

This conclusion is of limited value, however, unless the content of such territorially based limitations on jurisdiction are delineated. For example, a state's connection with one of its residents is sufficient to justify assertion of personal jurisdiction over the resident regarding transactions not connected with the state.[106] One could argue that, given this close connection between the state and its residents, contact with the residents amounts to contact with the state and that the state could therefore assert personal jurisdiction over anyone dealing with one of its residents.

106. Milliken v. Meyer, 311 U.S. 457 (1940).

This point is raised to indicate the potential breadth of jurisdictional categories that could be brought within the territorial framework.

Analysis of the limitations on state authority relative to the other areas of the law does permit, however, some conclusions as to the content of territorial limitations on personal jurisdiction.

First, if the defendant is a citizen or resident of the state, the state is authorized to assert jurisdiction over him. Courts have upheld this principle in the most directly analogous situation, criminal law.[107] A problem is presented by nonresident defendants who are casually present in the state and who are sued there regarding matters completely unrelated to the forum. Although assertion of jurisdiction in such circumstances is questionable as based on a connection that is neither continuing nor related to the state's regulatory interests, territory-based limitations would not divest the state of the power to regulate the conduct of all persons actually within its borders at the time of regulation.

If the defendant, on the other hand, is a nonresident not present in the state, the state cannot look to either a continuing or a current connection to the state's territory as a basis of authority for determining the legal effect of his actions. The state must therefore base any authority that it asserts on some past connection, and the problem becomes that of identifying the past connections adequate to support the state's assertion. In those areas of the law discussed previously, the focus in determining state authority with respect to nonresidents was on the connection between the state and the item or transaction to be regulated. The analysis did not look to the persons affected by the item or transaction.

For example, in the antisuit injunctions context, the injunctions were related to legal proceedings in the foreign state and often were obtained by residents of that state. The forum state, however, focused on the fact that the injunction sought to regulate a legal proceeding within the forum, and refused to enforce the injunction. The courts simply ignored the real connections between the injunction and the foreign state, focusing on the connections (or lack of them) between the foreign state and the object of its attempts at regulation, the local court system. Similarly the local action cases rejected foreign efforts to regulate local property. Residents of foreign states may have an interest in local property, but foreign states are, nonetheless, not permitted to control local real estate.

Again in criminal cases, the focus is on the location of the crime. Ap-

107. Skiriotes v. Florida, 313 U.S. 69 (1941).

parently, no state has ever sought to apply its law to a crime merely because the victim was a resident of the state. To be sure, there are states that apply their criminal law to defendants whose acts take place in other states. In such cases, however, some part of the transaction upon which defendant's liability depends has taken place in the forum state, and the jurisdiction over the defendant is based on the state's authority to regulate the event in its territory that forms part of defendant's crime.[108]

The focus is on whether the item or event to be regulated is at least partly local. A state cannot regulate foreign court proceedings, establish foreign land titles, tax foreign property, or pass on the criminality of transactions occurring elsewhere. The state is precluded from such exercise of power even if the state, or local residents, would benefit from such regulation.

This model then sets out the general rule that a state's sovereignty is territorially limited. Applying the model to the assertion of personal jurisdiction, exercising jurisdiction over a nonresident not present in the state must depend on whether some part of the event or transaction on which the defendant's liability depends occurs in the state. If the case involves a contract, some part of the negotiation or performance must have occurred in the state. If the case involves a tort, some act on which defendant's liability depends must occur in the state.

This rule seems to fit most closely with the more general pattern evidenced by the areas of law discussed above. In all of those, state authority turns on whether the state seeks to regulate local conduct, events or things, or to regulate conduct, transactions or things located someplace else. If in a contract action the state takes jurisdiction when the contract is partly negotiated or performed in the state, it seeks only to attach legal consequences to a transaction being carried out locally. If, in a tort case, a state is the scene either of defendant's act or of the liability-producing effect of that act, the state is regulating either local conduct or local events.

Local presence of at least part of transactions, conduct or events is not merely sufficient, but is necessary to permit the state to assert jurisdiction. For if all of the determinants of a nonresident defendant's liability took place outside the state, the state's assertion of jurisdiction over the defendant is a claim to regulate activities that did not take place within the state. The question cannot be whether effects of defendant's acts are

108. *See*, W. LAFAVE & A. SCOTT, *supra* note 82 at 118-25.

felt in the state if those effects are irrelevant to the question of whether or not he has broken the law. To say that particular effects are irrelevant to liability is to say that they are not the events that the law seeks to regulate in establishing a rule of liability. And, as in the areas of the law previously discussed, the key is the location of the object of or occasion for regulation. The test for personal jurisdiction therefore cannot be whether the defendant's conduct causes local "effects" if personal jurisdiction rules are to be consistent with general limitations on state sovereignty. The test instead must be whether what happened locally is itself an object of or at least part of an occasion for regulation by the state.[109]

This argument is consistent with *World-Wide* in deducing limits on personal jurisdiction from the limits on state sovereignty inherent in the United States governmental structure. In *World-Wide*, however, the Court held that Oklahoma's assertion of jurisdiction denied the defendants due process, even though the liability-producing event took place within Oklahoma, because defendant's contacts with Oklahoma were in no sense purposeful. The Court insisted that the only contacts adequate to support jurisdiction were intentional contacts. This intent requirement, however, does not follow as a matter of logic from territorial considerations. Intent plays no role in determining state jurisdiction in the areas of the law previously discussed, possibly because the connections upon which most of those cases focus cannot exist without intent. One cannot unintentionally own property in the place where the property is located. But even in the area of criminal law, the cases apparently do not focus on defendant's intent to act within the state, but only on whether he in fact *did* act within the state.[110] If personal jurisdiction rules follow the same restrictions imposed generally on exercises of sovereignty, intent limitations on personal jurisdiction cannot be justified.

Indeed, the intent requirement could produce anomalous results. Consider a variation on the *World-Wide* facts. Suppose the purchase of the car and the subsequent injury took place exactly as in the original case, except that Seaway's officers and employees, because of a grudge against the Robinsons, sold them a car known to be very dangerously defective.

109. Professor Brilmayer has also stressed the importance of regulable activity within the state to jurisdictional analysis. She addresses the issue in a slightly different context than does this Article. Her approach describes contacts that could be seen as "related" to a cause of action. She does note, nonetheless, the connection between regulatable activity and territorial sovereignty. Brilmayer, *supra* note 33, at 80-88.

110. *See, e.g.*, Lane v. State, 388 So.2d 1022 (Fla. 1980); State v. Baldwin, 305 A.2d 555 (Me. 1973).

Seaway intended injury to the Robinsons when the defect manifested itself, but had no particular reason to believe that the car would be outside New York when that happened. Assuming *arguendo* that the harm from the defect occurred in Oklahoma, Oklahoma could assert criminal jurisdiction over those responsible for the sale, obtaining custody through extradition. Under *World-Wide*, however, Oklahoma could not force Seaway to respond to a claim for civil damages.

The *World-Wide* rule means that if the liability-producing effects of the tortfeasor's conduct occur in a state with which the tortfeasor did not seek contact, that state may not regulate his conduct despite the conduct's connection with in-state events that are proper subjects of regulation. Thus the Court by requiring purposeful contact as the basis for personal jurisdiction is in effect discarding the territorial sovereignty model that it claims to be applying. The logic of territorial limitations on state sovereignty dictates that the occurrence within the state of a regulable event should create authority to regulate the conduct causing the event. The Court, however, refuses to permit the states to exercise authority in such circumstances because of a purposeful contact requirement completely unrelated to the issue of regulability.[111]

In summary, the argument to this point is as follows: the United States is a federation, the units of which—the states—are independent of

111. Professor Brilmayer sought to justify the Supreme Court's intent requirement by pointing to the loss distribution consequences of a state's asserting jurisdiction over defendants whose contacts with the state are fortuitous. Focusing on commercial defendants, she argues that eliminating any intent requirement by employing what she calls a strict liability approach to jurisdiction would permit a state to exceed its sovereign authority because a defendant in such a case will seek to spread any damages that it is obliged to pay over all of the consumers with whom it deals. If the defendant's contacts with the state are so slight as not to satisfy a purposeful contact standard of jurisdiction, she argues, it is likely that the market that the defendant normally serves will consist primarily of persons in states other than the forum. Thus the consequence of the state taking jurisdiction over the defendant is that any loss the defendant suffers will ultimately be borne by persons not subject to the state's sovereignty. Brilmayer, *supra* note 33 at 95-96.

This argument, however, proves too much. Any time a state asserts jurisdiction over an out-of-state entity doing little business in the state, the defendant will spread his loss primarily over out-of-state consumers. Those consumers' contact with the state in such circumstances are likely to be nonexistent, whether the *defendant's* contacts with the state are fortuitous or whether they are direct and intentional. If states are barred from taking jurisdiction whenever loss would fall primarily on out-of-state consumers, then assertions of jurisdiction over primarily out-of-state businesses will always be unconstitutional. Yet the courts do not adhere to such a strict rule. The more logical argument is that if a state is permitted to attach legal consequences to the unintended, unforeseen effects of out-of-state activity, then the state may assert jurisdiction over the persons causing those effects. The event is regulable and within the state's borders and, under the examples discussed, that should suffice to bring the event within the jurisdiction of the state's courts.

one another and, to a very great extent, of the central government. In particular, each controls its own judicial system, except to the extent that the Supreme Court has the last word on matters of federal law. The courts have treated the independence of the states as necessarily implying, as a matter of law, territorial limitations on state authority. Exercise of personal jurisdiction is, of course, exercise of state authority. Therefore, because sovereignty considerations lead to the conclusion that all state authority is territorially limited, it follows that one aspect of that authority, the exercise of personal jurisdiction, is similarly limited. Furthermore, the form that the limitations take is permitting states to apply their authority only when the object of or at least part of the occasion for regulation is within state territory. Applying the general limitations on sovereignty to the exercise of judicial jurisdiction, states may assert such jurisdiction over nonresidents outside the state—who because of their nonresidence are not subject to the state's authority in any personal capacity—only if the transactions, acts or events whose legal effect that the state claims authority to declare took place within the state.[112]

112. The textual discussion argues that, given the apparently generally accepted limitations on state sovereignty, one can deduce from those limitations the reach of the judicial jurisdiction of the states. That discussion seeks to make its point simply by reliance on logic and American case law.

Further confirmation is available, however, because the United States is not the only country in the world that is structured as a federation, with the units of the federation enjoying autonomy as to their judicial systems. Canada and Australia resemble the United States in this regard. Further, the members of the European Economic Community (EEC), though not parts of a single country, have by treaty accepted among themselves limitations on their jurisdiction over one another's domiciliaries. Thus, if these entities' approach to personal jurisdiction were very different from that argued here despite the similarity in organization, the argument that limitations on personal jurisdiction flow from structural/federalism concerns would be weakened. In fact, however, those entities' jurisdictional systems resemble the pattern described above. To be sure, this resemblance does not prove the logical necessity of the conclusion that this Article has reached; coincidence is always possible. The similarity, however, lends support to this Article's argument, and is therefore worth describing.

Both the Canadian and Australian jurisdictional systems resemble the United States in being federations that divide governmental responsibilities between the central government and the governments of semi-autonomous territorial units that compose the federation. R. CHEFFINS & R. TUCKER, THE CONSTITUTIONAL PROCESS OF CANADA 16-31 (1976); W. WYNES, LEGISLATIVE, EXECUTIVE AND JUDICIAL POWERS IN AUSTRALIA 15 (1976). In particular, the courts of each unit are viewed as parts of the governments of the units, not as elements of a single, national judiciary. J. LYON & R. ATKEY, CANADIAN CONSTITUTIONAL LAW IN A MODERN PERSPECTIVE 173 (1970); R. JOHNSTON, THE EFFECT OF JUDICIAL REVIEW ON FEDERAL-STATE RELATIONS IN AUSTRALIA, CANADA AND THE UNITED STATES 41-42 (1960).

The similarities between the three countries, however, do not extend to their formal constitutional arrangements for the treatment of judgments from the courts of any given unit in the courts of sister units. The United States Constitution includes the full faith and credit clause. U.S. CONST. art IV, § 1. Canada's constitution, The British North American Act of 1867, 30 & 31 Vict., ch. 3, contains no similar clause. Instead, it expressly allocates to the provinces authority to make laws governing

III. RESPONSES TO ARGUMENTS AGAINST A TERRITORIAL JURISDICTIONAL ANALYSIS

Many American commentators argue that the limitations on the exercise of personal jurisdiction should not be deduced from the fact that

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the treatment of judgments from other provinces. *Id.*, § 92 class 14. Australia's constitution contains a full faith and credit clause, AUSTL. CONST. § 118, as well as a provision authorizing the federal parliament to make laws concerning both the service of civil process and the execution of the judgments of the courts of the Australian states. *Id.*, § 51 (xxiv). This clause permits federal statutory extension of the territorial effectiveness of the state courts' process to create extrastate jurisdiction. *Ex parte* Iskra, 63 N.S.W. St. R. 538 (1963). The Service and Execution of Process Act implemented this clause. 10 AUSTL. ACTS. P. 1901-1973, 837 (Service Act).

Turning to the jurisdictional rules, and considering Canada first, one immediate problem is determining which jurisdictional rules to examine, because all Canadian provinces claim a much broader jurisdiction themselves than they recognize in sister provinces. *Compare* B.C. CT. R. 13 (3)(4) *with* Court Order Enforcement Act, B.C. REV. STAT. ch. 75, pt. 2 (1979) *and* N.S.R. PRACT. 10.08 *with* Reciprocal Enforcement of Judgments Act, N.S. STAT. ch. 13 (1973). While arguments exist on both sides, on balance the jurisdictional standard applied to foreign judgments seems closely analogous in function to the American due process standard. *See* Pennoyer v. Neff, 95 U.S. 714, 729-33 (1877). Focusing on that standard, all Canadian provinces have chosen to limit strictly the range of action of the courts of sister provinces. All of the provinces base the enforceability of sister province judgments on whether personal jurisdiction exists and apply restrictive jurisdictional tests. Under common-law rules followed throughout Canada, a court's jurisdiction to enter an enforceable judgment is recognized in a sister province only if the defendant was present, resident, or domiciled in the province rendering judgment, 1 J. G. CASTEL, CANADIAN CONFLICT OF LAWS 426 (1974), at the time process was served. *Re* McTavish and Hampton & Securities & Investments Ltd., 150 D.L.R. 3d 27 (Alta. Q.B. 1983); Rafferty's Restaurants Ltd. v. Sawchuk, [1983] 3 W.W.R. 261 (Man. Cty. Ct.)., *contra* Weigand v. Calgary Joint Ventures Ltd., [1979] 2 W.W.R. 671 (Alta.) A corporation is considered present in a province if it is carrying on business there, 1 J.G. CASTEL, *supra*, at 431, defined in terms substantially equivalent to "doing business" in American terminology, McClellan v. Elwood's Ltd., 30 N.B.2d 358 (Q.B. 1980). All Canadian common-law provinces have enacted the Reciprocal Enforcement of Judgments Act, providing for the enforcement in one province of judgments rendered in another. Reciprocal Enforcement of Judgments Act (REJA), ALTA. REV. STAT. ch. R-6 (1980); Court Order Enforcement Act, B.C. REV. STAT. ch. 75, pt. 2 (1979); REJA, MAN. REV. STAT. ch. J-20 (1979); REJA, N.B. REV. STAT. ch. R-3 (1973), read with Foreign Judgments Act, N.B. REV. STAT. ch. F-19 (1973); REJA, NFLD. REV. STAT. ch. 327 (1970); REJA, *N.S. STAT.* ch. 13 (1973); REJA, ONT. REV. STAT. ch. 432 (1980); REJA, P.E.I. REV. STAT. ch. R-7 (1974); REJA, SASK. REV. STAT. ch. R-3 (1978). The jurisdictional provisions of the Act, however, differ from those of the common law in only two respects: the Act does not permit jurisdiction over a natural person to be based on presence alone, and allows jurisdiction over an artificial person based upon carrying on business. *See, e.g.*, REJA, MAN. REV. STAT. ch. J-20, § 3(6) (1970). The courts have held that the Act was not intended to change substantially the common-law rules on enforcement of judgments. *Rafferty's Restaurants Ltd.*, [1983] 3 W.W.R. at 269-70.

Thus, Canada's provinces have limited one another's jurisdiction severely, with the exception of jurisdiction over extra-provincial defendants who own property in the province rendering judgment. Jurisdiction absolutely depends on physical connection with provincial territory. All transactional bases of jurisdiction, such as the commission of a tort within the rendering province, are deemed inadequate to support enforcement of a foreign judgment. Clearly, this approach is consistent with

this Article's basic argument, that jurisdiction depends on territorial sovereignty, although it is a most rigid application of that theory.

Australia presents a more complicated situation. The Australian Parliament is constitutionally authorized to enact, and has enacted, legislation concerning both service of process and execution of judgments of state courts. The Australian states have each also provided for extrastate service, judgments obtained under such state provisions being enforceable under Part IV of the Service Act, which permits no jurisdictional challenges to judgments. E. SYKES, A TEXTBOOK ON THE AUSTRALIAN CONFLICT OF LAW 362-66 (1972). Therefore, it is necessary to consider not only the Service Act's provisions for extrastate service, but also the analogous law of the individual states.

Read together, the Service Act, § 11(1), and the various state provisions, Supreme Court Act 52 1970, N.S.W. PUB. ACTS, sched 4, Part 10, § 1; Queensl. S. Ct. R. O. 11, R. 1; S. Austl. S.Ct. R. O. 11, R. 1; Tasm. S.Ct. R.O. 11, R. 1; Vict. S.Ct. R.O. 11, R. 1; W. Austl. S.Ct. R. O. 10, R. 1, permit assertion of jurisdiction over defendants in those situations commonly permitted in the United States, *e.g.*, local residence or domicile, suits on contracts made or breached within the state, suits on local torts, etc. The fairly common Australian provisions permitting jurisdiction over suits on contracts governed by local law have few American analogies, though such provisions fit into American concepts on the theory that, given the established character of such provisions, election that a contract be governed by a particular state's law amounts to consent to that state's jurisdiction. Other categories of provision common in Australia but not in the United States are those establishing jurisdiction over persons who are "necessary or proper parties" to suits already commenced against someone else who has been properly served, and over persons liable to indemnify one properly sued in the state. While such provisions are difficult to reconcile with the analysis of this Article, one must assume that some defendants subjected to jurisdiction as necessary parties or indemnitors, could be reached on some other theory. The Australian provision that most clearly is inconsistent with the approach of this Article is one in New South Wales permitting a suit based on local damage from a tort committed anywhere. Supreme Court Act 1970, N.S.W. PUB. ACTS, sched. 4, Part 10, § 1(e). As construed by New South Wales courts, any local harm whatever suffices to satisfy the statute; the statute is not limited in its application to such local damage that completes liability. Challenor v. Douglas, [1983] 2 N.S.W.L.R. 405.

Australia's statutes basically reflect the same sort of territorial orientation taken in *World-Wide* and in this Article. Court decisions that hold the validity of state jurisdictional provisions depend on a showing of a nexus between the state, the defendant and the subject of the litigation reinforce this orientation. The nexus requirement is in turn based on the argument that jurisdiction asserted by a legislature whose authority is limited by territorial considerations must satisfy those considerations. Cotter v. Workman, 20 F.L.R. 318, 325-27 (A.C.T. Sup. Ct. 1972). *Accord* Baldry v. Jackson, [1977] 1 N.S.W.L.R. 494 (C.L. Div.). Presumably for this reason, the *Challenor* court, which construed the New South Wales 'local harm' provision, observed in dictum that, construed as basing jurisdiction on local damage *not* required to establish liability, the rule was at least arguably ultra vires. New South Wales, *Challenor*, [1983], 2 N.S.W.L.R. at 419.

Thus, Australia takes an approach to jurisdiction that focuses on territorial sovereignty. This is particularly significant because the Australian constitutional provision permitting federal legislation to extend the reach of state process could presumably be used to eliminate the need for Australia to adopt such an approach. This has not, however, been done.

Jurisdiction in the EEC, as in Canada and Australia, reflects a territorial orientation. The EEC is not one country, but its members have by treaty limited their courts' jurisdiction over one another's domiciliaries. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended, 21 O.J. Eur. Comm. (No. L. 304) 1 (1978). This development cannot be ascribed to difficulties in enforcing judgments in countries other than the one rendering judgment, because the same treaty provides an essentially automatic method of enforcing in any EEC country,

American federalism assumes territorial limitations on state authority.[113] The following sections respond briefly to various arguments either challenging the territorial approach to jurisdiction or proposing substitutes for it.

A. The Inappropriateness of Territorial Analysis

One might argue that territorial jurisdiction analysis is fundamentally unsound for a number of reasons. First, it deals with excessive assertions of personal jurisdiction as ultra vires. In apparent contradiction, many courts have held that such assertions of jurisdictions violate the four-

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a judgment obtained in any other EEC country. *Id.* at 78. The EEC's territorial approach to jurisdiction, therefore, cannot be attributed to problems of enforcement nor can it be disputed.

Thus, the Convention rejects several bases of jurisdiction previously employed in some of the signatory countries that would be irreconcilable with the territorial approach to jurisdiction described in Part II of this Article. France is forbidden to take jurisdiction of a case solely because the plaintiff is a French national. Germany may not claim personal jurisdiction over persons merely because they own property in Germany. The Netherlands may not take jurisdiction over a case merely because the plaintiff resides in the Netherlands. *Id.* art. 3. The Convention's rule is that persons should be sued in the country in which they are domiciled, *id.* art. 2, but it also establishes a number of special jurisdictional bases. All defendants in a case may be sued at the domicile of any one of them, *id.* art. 6(1); third-party defendants may be sued in the court in which the original suit is being heard, *id.* art. 6(2); contract cases generally may be brought at the place of performance of the contract, *id.* art. 5(1); a consumer may sue on consumer contracts at his own domicile, if the contract involved installment payments, or relates to financing of a goods purchase, or was solicited at his domicile and he concluded the contract there, id. arts. 13, 14; and tort suits may be brought in the country in which the "harmful event" occurred, *id.* art. 5(3). One should note that this tort provision has been interpreted to permit suit either at the place where the defendant did the act giving rise to the harm or at the place where the plaintiff felt the harm. The latter apparently is appropriate whether or not harm was foreseeable at that place. Handelskwekerij G.J. Bier B.V. v. Mines de Potasse d'Alsace SA, 1976 E. Comm. Ct. J. Rep. 1735, 1748-49 (Preliminary Ruling), [1977] 1 Comm. Mkt. L. R. 284, 301. The courts have not addressed the question of whether the local harm to which the treaty refers is such harm as is needed to complete the tort, or, instead, any local harm at all.

Thus the EEC adhered to a territorial approach to personal jurisdiction. The principal exceptions to this generalization are the Convention's permitting jurisdiction over multiple defendants at the domicile of any one, and over third-party defendants at the site of the main suit. More striking than these departures from strict territoriality is the Convention's general adherence to the territorial approach, despite the EEC's absolute freedom to select any approach to jurisdiction it chose.

In summary, this brief examination of three entities with structures resembling that of the United States reveals approaches to jurisdiction generally consistent with the analysis of this Article. Canada, Australia (except possibly New South Wales) and the EEC all demand either local affiliations or local events related to liability before asserting jurisdiction over a defendant.

113. *See generally* Braveman, *supra* note 5; Gottlieb, *supra* note 5; Jay, *supra* note 5; Redish, *supra* note 5; Silberman, *supra* note 7; von Mehren, *Recognition and Enforcement of Foreign Judgments- General Theory and the Role of Jurisdictional Requirements*, 167 RECEUIL DES COURS 9 (1980).

teenth amendment's due process clause, and therefore are not entitled to full faith and credit under the full faith and credit clause. In fact there is no contradiction. Rather, the due process violation derives from the very fact that such an assertion of jurisdiction is ultra vires. This is the thrust of *Pennoyer v. Neff*, the first case asserting that an excessive claim of personal jurisdiction denies due process.[114] The denial of due process lies not in some particular unfairness in the proceedings, but in the fact that the proceedings are illegitimate as beyond the state's authority. The due process clause should be understood as protecting not only the individual's rights to notice, hearing, an unbiased decision-maker, but also his "interest in freedom from an unrelated sovereign."[115] This absorption into the due process clause of limitations on state authority derived from limitations on territorial sovereignty is not unique to personal jurisdiction analysis. As seen above, in the area of state jurisdiction to tax, the Supreme Court has held state actions to be due process violations essentially on ultra vires grounds.[116]

This federalism-related analysis of personal jurisdiction might also seem inconsistent with certain language in *Insurance Corp. of Ireland v. Compagnie Des Bauxities De Guinee.*[117] The Supreme Court in *Insurance Corp.* affirmed the district court's holding that, because personal jurisdiction limitations protect only individual liberty interests, individuals may waive or be estopped from raising them.[118] In the course of its discussion, the Court described the personal jurisdiction requirement as restricting judicial power "not as a matter of sovereignty, but as a matter of individual liberty."[119] Certainly, this language suggests that the Court sees personal jurisdiction limitations as unrelated to sovereignty considerations. If that reading is correct, then the analysis in this Article contradicts *Insurance Corp.* and is therefore questionable. Several reasons exist, however, to doubt the correctness of that reading, including the context of the Court's statement, the accompanying text and footnotes, and the nature of sovereignty.

The context of the Court's statement demonstrates that *Insurance Corp.* was more concerned with explaining what personal jurisdiction

114. *Pennoyer*, 95 U.S. at 729-33.

115. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1047 (1983).

116. *See supra* text accompanying notes 64-81.

117. 456 U.S. 694 (1982).

118. *Id.* at 702-07.

119. *Id.* at 702.

was not, than with what personal jurisdiction was. The statement occurs in the course of a discussion in which the Court seeks to establish the waivability of personal jurisdiction limitations. More specifically, it follows a portion of that discussion describing subject matter jurisdiction as contributing to the "characterization of the federal sovereign" and therefore as not waivable by the parties.[120] The statement is part of a paragraph distinguishing personal jurisdiction from subject-matter jurisdiction on the ground that the former involves only a personal liberty interest.[121] Clearly, the Court's focus is simply on establishing that personal jurisdiction may be waived; unlike *World-Wide*, the opinion is not a general exploration of the rationale and limits of personal jurisdiction, and should not be read as such.

Aside from considering its context, the Court's statement must be read in conjunction with a footnote appended to it, which is reproduced below.[122] In that footnote, the Court acknowledged that *World-Wide* stated that personal jurisdiction reflects the "character of state sovereignty," reaffirmed without description the minimum contacts test, and stated that "the restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function

120. *Id.* at 701-02.

121. *Id.* at 702-03.

122. It is true that we have stated that the requirement of personal jurisdiction, as applied to state courts, reflects an element of federalism and the character of state sovereignty vis-à-vis other states. For example, in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980), we stated:

> "[A] state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum State. The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."
>
> Contrary to the suggestion of JUSTICE POWELL, post, at 713-714, our holding today does not alter the requirement that there be "minimum contacts" between the nonresident defendant and the forum State. Rather, our holding deals with how the facts needed to show those "minimum contacts" can be established when a defendant fails to comply with court-ordered discovery. The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.

456 U.S. at 702 n.10.

of the individual liberty interest preserved by the Due Process Clause."[123]

This footnote argues strongly against the proposition that the *Insurance Corp.* Court intended to say that personal jurisdiction has nothing to do with territorial sovereignty. If that is what the Court meant to do, one would expect its footnote to characterize *World-Wide*'s rationale as incorrect. The footnote, however, does not. Moreover, in reaffirming *World-Wide*'s minimum contacts test,[124] the Court could not have meant simultaneously to sever sovereignty considerations from personal jurisdiction. This follows because, according to *World-Wide*, sovereignty limitations compel the minimum contacts test. If the Court had reaffirmed the test while rejecting the relevance of sovereignty to personal jurisdiction, it would have proclaimed a jurisdictional standard while simultaneously destroying the rationale for that standard. Finally, the Court in its footnote affirms the link between sovereignty and personal jurisdiction. Although the Court's exact meaning in labelling sovereignty restrictions "a function" of individual liberty interests is unclear, the language must mean that sovereignty restrictions are relevant to the personal jurisdiction rules protecting the liberty interest in question.

The language in the text of the Court's opinion, however, must have some meaning. If as suggested here, a close reading of the accompanying footnote requires a rejection of the apparent meaning of that language, it is necessary to indicate what it does mean. This meaning *can* be determined; all that is required is a consideration of context.

The statement follows a discussion of subject-matter jurisdiction, limitations on which are described as flowing necessarily from limitations on federal sovereignty. The best way to understand the Court's text language, therefore, is to read the language as though the Court had said that personal jurisdiction "represents a restriction on judicial power not as a matter of sovereignty *in the same sense* that subject-matter jurisdiction restrictions are a matter of sovereignty, but as a matter of individual liberty." The language in the appended footnote that rejects the idea that federalism is "an independent restriction on the sovereign power of the

123. *Id.*

124. The Court in referring to the minimum contacts test presumably meant the version of that test expounded in *World-Wide* because *World-Wide* was the most recent case preceding *Insurance Corp.* dealing with the matter and because the Court did not indicate that any other minimum contacts test was meant.

court,"[125] presumably means that personal jurisdiction, unlike subject-matter jurisdiction, is not independent of individual liberty concerns, and strengthens this interpretation. Furthermore, this interpretation is consistent with the appended footnote, unlike an interpretation that saw the Court as rejecting any link between sovereignty and personal jurisdiction.

If this analysis is correct, what the Court is saying can be restated as follows: sovereignty limitations are relevant to personal jurisdiction in indicating from which states, as a matter of personal liberty, an individual is entitled to protection. This protection is solely a function of the recognition of the individual's right to be free from an unrelated sovereign. It is not a manifestation of some aspect of sovereignty limitations so fundamental that they limit a court's power without regard to individual interests. Such limitations of course exist; limitation on subject-matter jurisdiction is one example. The Court is trying to say, however, that personal jurisdiction does *not* flow from this systemic type of sovereignty consideration, but rather from an individual's (waivable) right to be free from unrelated sovereigns. On this reading, therefore, commencing a consideration of personal jurisdiction with a consideration of limitations on sovereignty is not merely appropriate, but necessary. All that *Insurance Corp.* adds is the caution that the personal jurisdiction rules deduced from sovereignty limitations do not touch the fundamentals of sovereignty so extensively that they cannot be waived.

The propriety of reading *Insurance Corp.* in this way is reinforced by the consideration that sovereignty manifests itself in various ways. Sovereignty includes authority over both particular categories of activity and particular people. Given the different aspects of sovereignty, different limitations on sovereignty may differ in significance. If a court violates a limit on subject-matter jurisdiction, for example, it is attempting to control a category of activity that, in all circumstances, it may not control. In so doing, the court flouts whatever rules limit its authority. But because those same rules establish its authority, a court that exceeds its subject-matter jurisdiction is essentially attacking the foundations of government society has established. In contrast, a court that claims authority over persons not subject to it does harm at a less fundamental level. It does not seek to control matters generally beyond its competence, but only to deal with particular transactions that, although within the classes of those it may address, involve people that it may not reach. The only

125. 456 U.S. at 702 n.10.

harm done, therefore, is to the people whose actions it seeks to control. Because the interests potentially harmed in such circumstances are so much narrower than is true with violations of subject-matter jurisdiction, the dangers to basic limitations on government stemming from violations of personal jurisdiction limitations are less severe. This difference in danger is therefore reflected in differing waiver rules. Waiver of personal jurisdiction is permitted, presumably, in part because those persons whose interests are involved are easily identifiable. With respect to subject-matter jurisdiction, however, the violations affect the interests of society as a whole. Waiver therefore is not possible, because waiver from any source other than society generally would not come from the entity whose interests were involved.

The notion that a limited type of limitation on sovereignty is involved in personal jurisdiction thus makes *Insurance Corp.* easier to understand. The Court is not saying that personal jurisdiction limitations do not flow from sovereignty limitations. Rather, the Court is saying that once one has gone through the process of determining the limitations that sovereignty imposes on personal jurisdiction, the rules that one deduces remain merely personal rights, waivable by the persons involved. Violations of personal jurisdiction rules derived from sovereignty limitations do not touch the very core of the court's authority. Sovereignty in the sense of touching the core of a court's authority is not implicated in the Court's personal jurisdiction analysis.[126] *Insurance Corp.* therefore

126. Related to the question is whether *World-Wide* itself, in invoking "federalism" as a limitation on the reach of personal jurisdiction, was seeking to protect individual rights or to protect the interests of other states. This Article concurs with Professor Drobak's conclusion that *World-Wide* sought to protect the defendant's "interest in freedom from an unrelated sovereign." Drobak, *supra* note 115. Any disagreement with this proposition is puzzling because nothing in *World-Wide* suggests the contrary. The Court in *World-Wide* made frequent reference to the sovereignty of states other than the forum state but only in the context of explaining limitations on the forum's sovereignty. *World-Wide*, 444 U.S. at 292-94. *World-Wide* argues that the existence of other states precludes the conclusion that any single state's jurisdiction could be unlimited. Thus, if a state seeks to coerce into its courts a defendant to whom its writ does not attach, *World-Wide* acknowledges that the defendant need not appear. Some commentators interpret *World-Wide* to stand for the proposition that the interests of other states were the source of limitations in jurisdiction and acknowledge that the passages in question are susceptible of a defendant-centered reading. *See, e.g.*, Lewis, *The Three Deaths of 'State Sovereignty' and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME LAW. 699, 712 (1983).

Professor Lewis, however, argues that this interpretation is "ultimately not persuasive" because the Court "twice recently reaffirmed that personal jurisdiction turns on contacts, not convenience." *Id.* In effect, he contends that the Court could not have intended merely to reaffirm the primacy of contacts because that was unnecessary. Thus, the Court must have had some other purpose. Profes-

does not contradict the analysis in this Article.[127]

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sor Lewis argues that the other purpose was to elevate sovereignty considerations to a limit on jurisdiction separate from, and superior to, contacts considerations. *Id.* at 712-13.

This argument faces two difficulties. First, the argument tortures the language of *World-Wide*. Throughout the opinion, the Court contrasted sovereignty limitations to issues of convenience and forum interest rather than to contacts analysis. Indeed, prior to the passage that rejected absence of inconvenience as a justification for jurisdiction, the *World-Wide* Court quoted International Shoe v. Washington, 327 U.S. 310 (1945), for the proposition that a state cannot issue a judgment against a defendant with whom it has "no contacts, ties or relations". *World-Wide*, 444 U.S. at 294 (quoting *International Shoe*, 326 U.S. at 319).

The second problem with Professor Lewis' argument is that it ignores two important reasons for restating the *Hanson* principle: Justice Brennan's dissent and academic criticism of that decision. Justice Brennan characterized the minimum contacts test as "outdated" and strongly advocated tests for jurisdiction based entirely on convenience. *Id.* at 307-08, 311-12 (Brennan, J., dissenting). Even after *World-Wide*, various commentators have attacked the territorially based jurisdictional test. *See supra* note 5. Thus, it is not surprising that Justice White took advantage of an opportunity to reiterate a rule whose continued existence was questioned in so many quarters. Shaffer v. Heitner, 433 U.S. 186 (1977), because it focused on quasi in rem jurisdiction, and Kulko v. Superior Court, 436 U.S. 84 (1978), because it was a family law case, did not settle the question.

Professor Redish likewise acknowledged that *World-Wide*'s treatment of federalism could be viewed as a protection of individual rights on the theory that in a government created by the consent of the governed, an individual is entitled to be judged only by the sovereign to which he owes allegiance. Redish, *supra* note 5, at 1125-26. Professor Redish rejects this interpretation, however, for three reasons. First, he asserts that the *World-Wide* Court was concerned exclusively with relations between states. Second, he observes that government-by-consent concepts cannot explain jurisdiction over transients. Finally, he states without explanation that a mere assertion of jurisdiction (assuming no inconvenience and application of appropriate substantive law) does not violate the allegiance principle. *Id.*

None of Professor Redish's arguments for the "allegiance" concept withstand examination. *World-Wide* was consistent with a view of defendants' rights that includes protection from alien sovereigns. Professor Redish's interpretation is not compelled by the language of the opinion. Second, Professor Redish, not the Court, equates allegiance to government by consent. These concepts, however, are different. Even undemocratic governments feel they are entitled to the allegiance of their citizens. Although reference to consent principles cannot justify assertion of jurisdiction over transients, a concept of temporary allegiance to local authority cannot be dismissed so easily. Finally, Professor Redish's denial that the mere taking of jurisdiction does no violence to the allegiance principle is not self-evident. After all, in taking jurisdiction, the state threatens a defendant with judgment if he does not respond to its summons, and claims the right to seize his property to satisfy any judgment rendered. If the existence of an allegiance limitation on authority is assumed, a state's assertion of the right to coerce a defendant into court by threats, and ultimately to compel him to pay a judgment, should be sufficient to trigger the limitation. Whatever the source of a rule of law, its relevance to a particular defendant is that a *court* asserted the rule as a basis for judgment against the defendant; the judge, not the rule, *decided* that a defendant's property should be seized. Thus the judge's right to allegiance is as relevant a question as the source of the obligation to obey the rule.

In summary, *World-Wide* can be read to espouse an individual rights principle, namely, the right of defendants to be free from the jurisdiction of unrelated sovereigns. The arguments against that reading either take the language of the opinion out of context, or ignore reasons why the Court could have seen a need to restate the position it first enunciated in *Hanson*.

127. Keeton v. Hustler Magazine, 104 S. Ct. 1473 (1984), and Phillips Petroleum v. Shutts, 105

B. *The Irrelevance of State Sovereignty*

Professors Redish and Jay have raised important objections to argu-

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S. Ct. 2965 (1985), also may cast doubt on this Article's analysis. Close examination of each opinion, however, demonstrates that no conflict exists.

In *Keeton*, the plaintiff sued the defendant for libel in New Hampshire. The plaintiff sought to recover not only for damage to her reputation in New Hampshire, but also for her damage in all other states in which the defendant's nationally distributed magazine circulated. 104 S. Ct. at 1477. The Supreme Court upheld New Hampshire's jurisdiction over plaintiff's non-New Hampshire claims, holding that the state's interest in cooperating with other states through the "single publication rule" was adequate to support jurisdiction. 104 S. Ct. at 1478-80. Under the single publication rule, the publication of a libel in a single issue of a magazine or newspaper is treated as a single tort no matter how many copies of the item circulate and no matter where they appear. RESTATEMENT (SECOND) OF TORTS § 577A (1977). This holding appears to conflict with this Article's analysis because it permits New Hampshire to assert jurisdiction over torts—damage to plaintiff's reputation in other states—no element of which took place in New Hampshire. Further, its reliance on "state interest" analysis contradicts the argument in this Article that the state's interests are irrelevant to the jurisdictional inquiry.

Keeton is reconcilable with this Article, however, when the nature of the tort of defamation is considered. In committing defamation, a defendant by a publication in one place simultaneously harms the plaintiff's reputation in many places. It is certainly plausible to regard all aspects of the tort as one transaction. From that point of view, any state where one part of that transaction takes place could, consistent with the analysis presented here, pass upon the legal effect of the entire transaction. The situation is no different from that which occurs when a state asserts criminal jurisdiction over a robbery committed elsewhere when the perpetrators kidnap the victim and subsequently murder him in the forum state, on the theory that the analytically separable robbery is part of the same offense as the murder. *See, e.g.*, Baldwin v. State, 372 So. 2d 32 (Ala. 1979), *vacated and remanded on other grounds*, 448 U.S. 903 (1980). In both cases authority over one aspect of the transaction is held to be adequate to justify assertion of authority over the entire transaction. In this context, the Court's reference in *Keeton* to the state's interest in asserting jurisdiction can be seen as an acknowledgment of the unitary character of the tort.

Shutts presents the unusual question of determining jurisdiction over nonresident unnamed members of a plaintiff class in a class action. In *Shutts*, Kansas had taken jurisdiction of a class action in which the plaintiff class included a very high proportion of non-Kansans. 105 S. Ct. at 2967. The Court observed that, in these circumstances, the absent class members faced the prospect of a loss of property through state action in the form of extinction of the class members' claims against defendant by operation of res judicata. 105 S. Ct. at 2972. Nonetheless, the Court refused to hold that Kansas' authority over the class was to be analyzed under the minimum contacts test. *Id.* This holding would appear to contradict this Article because the position of the absent class members is for most purposes indistinguishable from that of defendants; neither group has invoked the jurisdiction of the court and both stand to lose property by reason of the court action. If judicial jurisdiction is territorially limited, then judicial authority over members of a plaintiff class ought to depend on the same test as judicial authority over defendants; yet, the Court appears to reject this parallel.

Shutts in fact, however, is easily reconciled with the analysis of this Article. The Court held in *Shutts* that jurisdiction could be upheld because the state had provided class members an opportunity to opt out of the lawsuit. 105 S. Ct. at 2975. The Court observed, "Any plaintiff may consent to jurisdiction. . . . The essential question, then, is how stringent the requirement for a showing of consent will be." *Id.* The Court then went on to hold Kansas' procedures adequate to permit an inference of consent to jurisdiction from members of the plaintiff class. *Id.* Because the Court is obviously referring to a form of actual consent, it is clearly not holding that state jurisdiction over

ments linking personal jurisdiction to state sovereignty considerations. Professor Redish argues that because "due process" as defined prior to the enactment of the fourteenth amendment did not apply federalism concerns to personal jurisdiction, and because no express constitutional provision limits a state's assertion of personal jurisdiction, the only possible justification for linking jurisdictional limitations to federalism concerns is that such concerns are implicit in the Constitution.[128] Professor Redish, however, stresses the general undesirability of enunciating constitutional restraints on state authority that have no basis in the text of the document.[129] He also asserted that restraints on personal jurisdiction cannot be linked to assumptions about the Framers' view of the Constitution's reach and cannot be classified as vital to the constitutional system.[130] According to Redish, such arguments are inconsistent with the Supreme Court's holding in *Nevada v. Hall*.[131]

Professor Redish's argument has several flaws. First, it ignores fundamental characteristics of the Constitution. The Constitution does not define state powers, except insofar as they are restricted by prohibitions and allocations of power to the federal government. Aside from the first two sections of article IV, the Constitution does not address the interrelations of the states respecting exercise of powers *not* pertaining to the central government. One logically may speculate that it was thought unnecessary in 1787 to devote extensive attention to the states and their mutual relations. After all, the Constitution does not purport to be the source of the *states'* authority to govern; the states were well-established political bodies in 1787. Thus, the only reason to deal directly with the powers of the states in the Constitution was to establish the obligations and prohibitions necessary to alter then-existing practices; it was unnecessary to mention existing practices whose continuation was taken for granted. Therefore, the Constitution's silence on the issue of personal jurisdiction means less than Professor Redish suggests.

Professor Redish also does not adequately deal with the implications of pre-fourteenth amendment interpretations of the full faith and credit

absent class members can be evaluated without explaining the basis of the state's authority: actual consent. As previously argued, the idea that protections against excessive assertions of personal jurisdiction can be waived is perfectly consistent with the position taken in this Article.

128. Redish, *supra* note 5, at 1129-30.

129. *Id.* at 1130.

130. *Id.* at 1130-31.

131. 440 U.S. 410 (1979).

clause. In *D'Arcy v. Ketchum*,[132] the Court interpreted that clause as not extending the reach of the states' judicial jurisdiction as it stood in 1790.[133] *D'Arcy* thus held, in effect, that limits on state jurisdiction existed despite the Constitution's silence on the subject and despite the arguably contrary language of the full faith and credit clause. Professor Redish, however, urges that the full faith and credit clause was irrelevant to personal jurisdiction issues, insisting that the clause concerned only enforcement of judgments and choice of law and observing that "choice of law and personal jurisdiction are very different questions."[134] He characterizes *D'Arcy* as merely establishing an exception to the full faith and credit clause.[135]

Professor Redish's efforts to explain away the full faith and credit clause cases fail. Although he is correct in asserting that personal jurisdiction and choice of law raise different issues, personal jurisdiction has traditionally been regarded in common-law jurisdictions as figuring prominently in questions of enforcement of judgments.[136] Thus, full faith and credit cases dealing with enforcement of judgments will often touch on the personal jurisdiction issue. *D'Arcy*, one such case, found limits on the personal jurisdiction of the states to exist because of the absence of an intent in the Constitution to give to the states more extensive jurisdiction than they had prior to 1790. That is, *D'Arcy* looked beyond the Constitutional text, relying on aspects of state sovereignty that the Court found unaltered, albeit not mentioned, by the Constitution.[137]

The writings of Justice Story reinforce the view that the Constitution assumes limitations on state jurisdiction. Justice Story stressed that, prior to the adoption of the Constitution, the states treated one another's judgments as foreign[138] and that the full faith and credit clause "did not

132. 52 U.S. (11 How.) 165 (1850).

133. *Id.* at 174-76.

134. Redish, *supra* note 5, at 1123.

135. Redish, *supra* note 5, at 1124.

136. E. SCOLES & P. HAY, CONFLICT OF LAWS 966-71 (1982).

137. In *D'Arcy*, the Court observed that "the international law as it existed among the States in 1790" rendered a state-entered judgment void. *D'Arcy*, 52 U.S. (11 How.) at 176. The Court held that the Constitution and the full faith and credit clause were not intended to alter this aspect of the law of 1790. Instead, they were intended to make judgments rendered in one state conclusive on the merits in all states, rather than mere prima facie evidence on the merits as was true in 1790. *Id.* at 175-76.

138. J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1307 (5th ed. Boston 1891).

mean to confer a new power or jurisdiction; but simply to regulate the effect of the acknowledged jurisdiction over persons or things within [state] territory."[139] If the Constitution was *not* intended to enlarge state jurisdiction, however, the authority of the states necessarily remained as limited as it was prior to the adoption of the Constitution. Both Justice Story and the Supreme Court in *D'Arcy*, therefore, saw implicit in the Constitution the assumption that the states' authority is territorially limited because the Constitution did not alter the state's limited authority as it existed prior to the adoption of the Constitution.

Thus, Story and *D'Arcy* undercut Professor Redish's arguments. Indeed, Professor Redish's argument is a classic example of one that proves too much. Although nothing in the Constitution expressly forbids any sort of exercise of state authority beyond state borders, such a limitation is assumed to exist.[140] What prevents Arkansas from sending its highway patrol to police the roads of Texas? A person arrested could not complain of any lack of fairness, at least to the extent that Arkansas law duplicated Texas law, but it is inconceivable that such an excess of executive authority would be upheld.

Additionally, *Nevada v. Hall*[141] cannot bear the weight that Professor Redish assigns to it. *Hall* held that the Constitution did not affect the question whether the states had an obligation to accord one another immunity from judicial process. Because recognition of sovereign immunity was viewed solely as a matter of comity in 1789, the Court held that no legal bar prevented a state from denying immunity to a sister state.[142] Professor Redish argues that subjecting a state to judicial process is a greater interference with its interests than is an assertion of personal jurisdiction over an inhabitant of the state. Thus, he concluded that if federalism permits the one, it surely must permit the other.[143] The federalism concerns addressed in *World-Wide*, however, focus on protecting individuals from ultra vires acts, not on protecting the interests of other states.[144] The holding in *Hall* is not inconsistent with an ultra vires analysis: what was legally within a state's power in 1789, taking jurisdiction over another state, remains within its power; what was beyond its

139. *Id.* § 1313 (footnote omitted).

140. *See supra* notes 39-112 and accompanying text.

141. 440 U.S. 410 (1979).

142. *Id.* at 416-18.

143. Redish, *supra* note 5, at 1131-32.

144. *See supra* note 126.

power in 1789, asserting jurisdiction over one foreign to its territory, remains beyond its power.

Professor Jay asserts yet another argument. He states that sovereignty considerations are simply not appropriate in an analysis of the jurisdiction of state courts all in one country. He notes that the origin of this approach rests in Justice Story's writings, and insists that such considerations made sense only in defining the jurisdiction of independent countries. Such considerations were proper in that context, Professor Jay argues, because one sovereign could well refuse to enforce another's judgments. The courts of one country entertained sovereignty considerations to avoid handing down judgments that could not be enforced in the courts of another country. Between American states, however, which the Constitution requires to enforce each other's judgments, sovereignty concerns have no place.[145]

Professor Jay's argument ignores the context in which the question of jurisdiction was likely to arise in Justice Story's day. Very often, that question arose when the courts of one country had to decide whether to enforce another country's judgment. If, in the view of the enforcing court, the original court had jurisdiction, then the foreign judgment was enforced.[146] In other words, a country's courts did not simply invoke sovereignty-oriented jurisdictional rules to avoid rendering unenforceable judgements, as Professor Jay implies; the courts also used those rules to identify foreign judgments entitled to enforcement.

Once the matter is phrased this way, the argument for the use of sovereignty-based jurisdictional rules in both the inter- and intra-national arena is much stronger. In the international arena, the courts invoked sovereignty considerations to decide whether another country's judgments should be enforced. Likewise, the American states employ territorial limitations on the exercise of personal jurisdiction to determine whether a sister state's judgment should be enforced, and whether the states should assert jurisdiction themselves. The inter- and intra-national contexts therefore are not, as Professor Jay suggests, incompatible. Rather, both involve determining the circumstances in which courts *ought* to be able to take jurisdiction.

145. Jay, *supra* note 5, at 453-54.

146. J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 586-90, 809-12 (Boston 1983).

C. *Fairness*

Commentators frequently argue that a proper approach to jurisdiction would simply focus on a "fair" balancing of the interests of the parties and the state, ignoring the *Pennoyer* sovereignty approach.[147] More specifically, they argue that considerations such as the parties' relative capacities to litigate in a forum distant from their homes[148] and convenience of litigation[149] ought to govern personal jurisdiction analysis. Commentators even argue that modern courts in fact employ a fairness approach and that efforts to deduce limits on jurisdiction from other general principles must therefore necessarily fail.[150]

One obvious difficulty with the fairness argument is that fairness is not an easy term to define. A determination of the relative ability of litigants to bear the burdens of litigation is not an inherently better test of fairness than, for example, the care that a state takes to avoid demanding obedience from those defendants not properly subject to its authority. Even assuming that considerations such as ability to bear burdens and convenience are the proper determinants of fairness, arguments that jurisdiction should turn primarily on such factors are nonetheless flawed.

Any argument asserting fairness as the basis for personal jurisdiction analysis fails to confront the core issue in jurisdictional inquiries. Characterizing the question as one of "jurisdiction" raises fundamental issues as to extent of the state's authority. The extent of authority cannot be resolved through fairness considerations unless such considerations are the basis of state authority. Fairness considerations, however, are not the source of state authority. For example, a state could more "fairly" give relief to civil plaintiffs if it could serve process nationwide. The possibility of enhanced fairness, however, does not establish the state's authority to serve process nationwide. The basic issue in jurisdiction analysis is the source of state authority. A personal jurisdiction analysis that is based on the "fairness" of the result, therefore, simply misses the point.

147. *See, e.g.*, Lewis, *supra* note 5, at 3; von Mehren, *supra* note 6, at 300-11.

148. Jay, *supra* note 5, at 446-47; von Mehren, *supra* note 6, at 313-14.

149. Jay, *supra* note 5, at 448, 471; von Mehren, *supra* note 6, at 322-23.

150. von Mehren, *supra* note 113, at 53-54. Professor von Mehren apparently expressed this view prior to the Supreme Court's *World-Wide* decision. He has since acknowledged that *World-Wide* looks to considerations of power as well as considerations of convenience. von Mehren, *supra* note 6, at 310 n.93.

D. Plaintiffs' Rights

A more serious argument is that territorially-based limitations on personal jurisdiction ignore plaintiffs' constitutional right to sue.[151] The problem with this argument is that it is very difficult to establish that such a constitutional "right to sue" exists.

Under the due process clause, a civil court's determination that it may not exercise jurisdiction over a defendant will be unconstitutional only if the plaintiff is thereby deprived of a property interest.[152] The court's action, therefore, cannot deny plaintiff due process unless it deprives him of his right to recover from the defendant. A court's determination that it lacks jurisdiction, however, does not affect the plaintiff's substantive claim.[153] The plaintiff still may assert the cause of action in an appropriate court. The court's refusal to take the case does not violate the plaintiff's due process rights.

Professor Brilmayer suggests that a dismissal on too narrow jurisdictional grounds can deprive the plaintiff of due process by forcing him to litigate in a state with which he has no connection.[154] The lack of connection between a distant forum and the plaintiff, however, is not of constitutional significance. Contacts are required only between a state and a person whose rights the state affirmatively claims authority to affect. The state asserts no authority over the plaintiff, however, until the plaintiff voluntarily enters the forum. Moreover, if a plaintiff faced with the prospect of distant litigation loses his claim, it is not because any government has divested him of it, but because he does not pursue his claim. A similarly placed defendant, in contrast, would lose property directly because of a state's assertion of authority in the form of a default judgment.

Supreme Court decisions also militate against a plaintiff's right to sue approach. In *Perkins v. Benguet Consolidated Mining Co.*,[155] the Supreme Court held that a state was not obliged to take jurisdiction over a nonresident defendant, though doing so would not have violated due process.[156] A plaintiff has no right to a forum if the states are not obliged to take jurisdiction over a nonresident defendant, because a "right to a forum" in this context means an obligation by the state to coerce the

151. *See, e.g.*, Jay, *supra* note 5, at 454.
152. U.S. CONST. amend. XIV, § 1.
153. RESTATEMENT 2D OF JUDGMENTS § 20(1)(1) (1982).
154. Brilmayer, *supra* note 33 at 108-11. *See also* Lewis, *supra* note 5, at 26-27.
155. 342 U.S. 437 (1952).
156. *Id.* at 440-41, 446-49.

defendant into that state's courts. After *Perkins*, states clearly have no such obligation.[157]

Helicopteros Nacionales de Colombia, S.A. v. Halls[158] also is inconsistent with a plaintiff's right to sue argument. The plaintiff in *Helicopteros* argued that Texas should have been able to take jurisdiction over a Colombian corporation because the corporation could not be sued jointly with the American defendants in any other forum. The Court rejected this argument, and observed that defendants might be sueable jointly in the courts of various foreign countries.[159] If due process obliged a state to provide a plaintiff with a forum, however, a plaintiff could not be forced to litigate outside the United States.

The final difficulty with a plaintiff's right to sue approach is that it conflicts with the basic principle that states control civil liability. If a plaintiff argues that a refusal to take jurisdiction denies his right to a forum, his objection must be that the state refused to coerce into court a particular defendant alleged to have harmed the plaintiff. The plaintiff in effect would be asserting that the state was compelled to give him an opportunity to recover for a particular wrong. Under this view, the state's failure to assert jurisdiction would deprive the plaintiff of a chance to recover from any defendant over whom the state could have asserted jurisdiction consistent with the fourteenth amendment. A plaintiff's right to recover, however, also requires a determination that a defendant has conducted himself in a manner that makes the defendant liable to the plaintiff.

Once consideration is given to the role that substantive law plays in a plaintiff's recovery, the plaintiff's "right" may be characterized two ways. Under the first alternative, the state would be free to create whatever rules of substantive law it chooses. Once the substantive rules were established, however, the state would be obliged to define the personal jurisdiction of its courts consistently with constitutional requirements. Thus, the Constitution indirectly would determine what individuals would be subject to the state-defined substantive rules. Under the second alternative, a plaintiff would have a right to a constitutionally defined minimum level of protection. As with the first alternative, the state would be obligated to extend its jurisdiction as far as the constitutional minimum standard required; however, the state also would be constitu-

157. *See* Brilmayer, *supra* note 33, at 110 n.151.
158. 104 S.Ct. 1868 (1984).
159. *Id.* at 1874 n.13.

tionally required to create a minimum level of substantive protection. A state would deprive a plaintiff of property under this theory if it did not provide a means to recover against a defendant: (1) within the minimum constitutionally mandated jurisdiction; and (2) who committed an act for which the Constitution requires the state to provide a remedy. This theory would in effect make the Constitution the source of an individual's substantive obligations.

The first alternative speaks in terms of a plaintiff's constitutional right that a certain population be brought within the jurisdiction of the state's courts. The second alternative, however, goes beyond the first, adding a constitutional right to require a state to proscribe certain activities as substantively unlawful. A hypothetical illustrates that less difference exists between the two than might be supposed.

Assume that the defendant corporation, a manufacturer, is incorporated in state A and has its corporate headquarters and production facilities in state A. The plaintiff is an individual resident of state B. The defendant maintains a small mail order division at its headquarters, but none of its products are distributed in state B. Defendant does a very small mail order business with individuals in state B, but otherwise has no connection with the state. The plaintiff orders a set of goods from the defendant's mail order division. Plaintiff is injured at his residence when the goods explode. Assume that if plaintiff is to recover from defendant, he can prevail only on a strict liability theory. State A rejects the doctrine of strict liability in tort; when state A's choice of law rules point toward application of the law of a state that applies strict liability, state A's courts will view the foreign rule as violative of state A's public policy and therefore as inapplicable. Plaintiff therefore is reluctant to sue in state A's courts. State B accepts strict liability, but it has no long-arm statute. State B's statutes provide for jurisdiction over nonresident corporations only if they do business in state B. "Doing business", as used in state B's statutes, has been judicially construed to mean a level of activity significantly greater than defendant's mail order trading.

Suppose plaintiff attacks state B's narrow jurisdictional statute, alleging that it deprives him of his "property" right to sue defendant. For plaintiff to prevail, a court would have to hold that the United States Constitution compelled state B to assert jurisdiction over defendant because defendant fell within the constitutionally required minimum jurisdiction and state B had chosen to enact a substantive rule of law that defendant had violated. Such a holding in effect would subject defendant

to a rule of substantive law to which it would not be subject if it could not be haled into state B's courts. State B's legislature is not the source of this substantive rule, *as far as defendant is concerned*. State B's legislature clearly elected not to regulate defendant's conduct when it did not enact a long-arm statute that would reach defendant, despite the knowledge that other states would not necessarily apply its law. Rather, the source of the substantive rule *as far as defendant is concerned* is the Constitution. The plaintiff's right to sue argument compels state B to assert jurisdiction and to subject defendant to state B's law despite state B's legislative decision not to do so. A rule, therefore, that a state is constitutionally compelled to assert jurisdiction over an individual means that the individual is compelled to obey whatever substantive rules that the state courts will apply because of the constitutional requirement that the state assert jurisdiction. Thus, for individuals, a rule ostensibly requiring a state to assert jurisdiction amounts to a constitutional requirement that these individuals obey particular substantive rules.

The Constitution, however, does not obligate states to apply particular substantive rules to particular individuals. The manner in which a state chooses to regulate private actions is purely a matter of state policy; its decisions about the rules applicable to private conduct cannot be deprivations of property.[160] If the state is free to define the content of the law of

160. In Munn v. Illinois, 94 U.S. 113 (1876), the Supreme Court upheld a state's right to regulate a previously unregulated business, stating:

> A person has no property, no vested interest, in any rule of the common law. That is only one of the norms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations.

Id. at 134. This rule has been followed consistently. *See, e.g.*, Silver v. Silver, 280 U.S. 117, 122 (1929) (upholding Connecticut guest statute); Arizona Employers' Liability Cases, 250 U.S. 400, 420 (1919) (upholding Arizona statute imposing employers' liability without fault for injuries to employees). *See also* Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 88 n.32 (1978) (upholding act limiting liability for and establishing indemnity fund for accidents resulting from operation of federally licensed nuclear power plants).

The Court in New York Cent. R.R. v. White, 243 U.S. 188 (1917), questioned whether a legislature could abolish a cause of action or defense without providing a substitute, *id.* at 201, but expressly declined to answer the question. *Id.* This "quid pro quo" concept found no favor in the courts. *See* Everett v. Goldman, 359 So.2d 1256, 1270 (La. 1978) (upholding statute requiring resort to medical malpractice mediation panel as prerequisite to suit); Attorney General v. Johnson, 282 Md. 274, 282-83, 385 A.2d 57, 62 (upholding statute requiring resort to medical malpractice mediation panel as prerequisite to suit), *appeal dismissed,* 439 U.S. 805 (1978); Montgomery v. Daniels, 38 N.Y.2d 41, 56-57, 378 N.Y.S.2d 1, 13-14, 340 N.E.2d 444, 453-54 (1975) (upholding no-fault insurance law, rejects "quid pro quo" rule in dictum); Singer v. Shepard, 464 Pa. 387, 393-401, 346 A.2d 897, 900-04 (1975) (upholding no-fault law).

persons subject to its jurisdiction, however, then the Constitution cannot be the source of individuals' substantive legal obligations. The second plaintiff's right to sue theory, therefore, must be false because it posits a constitutionally required minimum level of substantive law. Furthermore, a plaintiff's right to sue approach that looks solely to a jurisdictional minimum in fact, as in the above hypothetical, makes the Constitution the effective source of particular individuals' substantive legal obligations. Because the Constitution creates no rights in plaintiffs to demand that states impose particular rules of substantive law on particular groups, the conclusion follows that the Constitution cannot create a plaintiff's right to demand a given scope of jurisdiction. Such a right would be a disguised version of a constitutionally created substantive obligation for particular defendants.

In summary, a plaintiff's constitutional rights are irrelevant to the scope of a state's jurisdictional authority. Recognizing such interests is inconsistent with the due process clause, conflicts with the cases, and requires abandonment of the notion of state control of state substantive law. Under American law, plaintiffs simply have no due process rights relevant to the constitutional aspects of the proper reach of state jurisdiction.

D. Choice of Law and Jurisdiction

Some commentators have suggested that a focus on courts' jurisdiction is misplaced, and that the proper focus should be on choice of law.[161] Taken to an extreme, a focus on choice of law would uphold the jurisdiction of any convenient forum. Strict choice of law rules would protect defendant's interests under this theory, ensuring that the place of trial would not disadvantage the defendant. Although this focus is plausible, choice of law protections cannot substitute for limits on state court jurisdiction for two reasons.

First, vast disagreement exists concerning both the proper constitutional limitations on states' freedom to apply their own law in cases with multistate elements and the proper common-law approach to choice of law.[162] The degree of dispute over the content of a "correct" set of con-

161. *See* Redish, *supra* note 5, at 1136-37; Shaffer v. Heitner, *The End of an Era*, 53 N.Y.U. L. REV. 33, 82 (1978); Silberman, *supra* note 7, at 116; Weintraub, *Due Process and Full Faith and Credit Limitations on a State's Choice of Law*, 44 IOWA L. REV. 449, 456-67 (1959).

162. For example, see the disagreements among the commentators in *Symposium: Conflict-of-Law Theory After* Allstate Insurance Co. v. Hague, 10 HOFSTRA L. REV. 1 (1981).

flicts rules, the unsettled status of the traditional substance/procedure distinction,[163] and the uncertain role of forum public policy[164] under modern approaches, creates doubt that a yet-to-be devised set of conflicts rules can be a reliable alternative to a territorially-based jurisdictional system.[165]

The Supreme Court's rationale for jurisdictional limitations presents a more serious problem in using choice of law rules as a substitute for those limitations. The Court's key concern in its personal jurisdiction decisions has not been protection of the defendant from prejudice in litigation. The more important concern, not only in *World-Wide*, but also in *Pennoyer*, *International Shoe*, and *Hanson*, has been protecting the defendant from an illegitimate assertion of governmental sovereignty.[166] Even ignoring whether *any* choice of law approach could somehow legitimize a putatively illegitimate exercise of authority, choice of law cannot substitute for jurisdiction as a protection against ultra vires acts. Employing choice of law theories not merely to increase litigation fairness, but to compensate for the otherwise ultra vires character of the proceedings would cause serious problems in the administration of justice.

Consider, for example, if state A sought to exercise jurisdiction over a defendant with which it had no contacts at all, and sought to circumvent its lack of authority over defendant by applying the law of state B, whose authority over defendant was clear. In effect, state A would justify its assertion of jurisdiction on the theory that it would treat the defendant exactly as state B would. Accomplishing a real substitution of state B's law for state A's, however, would be impossible.

First, the traditional rules permitting state A to apply its own procedural law and to refrain from applying a rule contrary to its public policy could not be applied in this setting. If choice of law is to ensure litigation fairness and to compensate for an otherwise excessive exercise of jurisdiction, the use of any rule pertaining to state A's jurisprudence would taint the proceedings. The implications of this point reveal a more serious problem.

The effort to legitimize proceedings by application of B's law necessar-

163. *See, e.g.*, E. SCOLES & P. HAY, *supra* note 136, at 58-67.

164. *See, e.g., id.* at 72-75.

165. *See, e.g.*, von Mehren & Trautman, *Constitutional Control of Choice of Law: Some Reflections on Hague*, 10 HOFSTRA L. REV. 35, 38 (1981).

166. *World-Wide*, 444 U.S. 286, 291-94 (1980); Hanson v. Denckla, 357 U.S. 235, 251 (1958); *International Shoe*, 326 U.S. 310, 319 (1945).

ily rests on the assumption that A will guarantee a result identical to that state B's courts would reach. The problems of such an effort go beyond the practical ones of unfamiliarity with the intricacies and traditional usages of a strange system, because the "law" of a state consists not only of the state's rules, but also of the people and institutions that apply and interpret the rules. Thus, mimicking the result that another state would reach requires more than the application of another state's substantive and procedural law. Achieving such a result would require state A's court to duplicate the trial in state B, whose law is being applied, and review of the trial court's decision by an exact replica of state B's appellate system. Indeed, duplication may be impossible unless the decision is appealable to the appellate courts of the state whose law is applied because, at the appellate level, potential differences in result arising from differences in personnel are quite possible. Such an inter-state appellate process is most unlikely. However, without such a process, and the other attempts at duplicating state B's system described above, state A would not be applying state B's law. State A would merely be employing rules drawn from state B's law in its own system, which has no legitimate authority in the matter.

It might be argued that this scenario is much overdrawn. After all, current choice of law practice stops far short of the effort at mimicry described above. Even the federal courts retain authority to apply their own rules in diversity cases, even in some cases in which application of federal rules could produce a different result from that if the case were tried in a state system.[167]

A response based on current choice of law practice, however, ignores the great difference between the function that choice of law would play in the suggested scenario as opposed to both current choice of law practice and the federal *Erie* doctrine. In the proposed scenario, a court is claiming authority to control the defendant *only* because it is employing a correct choice of law approach. The court asserts, in effect, that the issue of the legitimacy of its authority does not arise because the court is applying the same rules that a legitimate authority would apply. Using choice of law to legitimize a result is quite different from the role that choice of law plays currently. Under the current system, only courts with jurisdiction can hear a case. Their authority does *not* depend on choice of law rules. When its authority over defendants does not depend on choice of law, a

167. Hanna v. Plumer, 380 U.S. 460, 472-74 (1965).

court can approach choice of law differently than a court whose authority does depend on choice of law. In the latter case, the court must make itself indistinguishable from a court of legitimate authority, which is not necessary under current practice.

Nor does the federal *Erie* doctrine undercut the proposed scenario. *Erie* addresses the implications of the federal courts' lack of authority to make substantive rules regarding questions raised in cases in which federal subject-matter jurisdiction is based on the parties' diversity of citizenship. While federal courts facing *Erie* questions are constrained to follow applicable state law with respect to a greater range of subjects than in the typical state's choice of law rules,[168] the federal courts in these circumstances do not feel obligated to make themselves carbon copies of state courts.[169]

Again, however, there are crucial differences between the scenario and an *Erie* problem. Under the proposed scenario, the forum has *no* authority over a defendant unless it adheres to a proper choice of law approach. In an *Erie* situation, by contrast, the federal lack of authority extends only to questions of substantive law. Article III of the Constitution establishes the authority of the federal courts to hear cases as a system distinct from the states, and thus justifies the federal courts' use of their own rules.[170] The federal courts' lack of authority relates to only part of the judicial function, developing rules of substantive law. Courts whose authority over a defendant depends entirely on copying a foreign state's law must take a different approach than a court that only lacks authority over questions of substantive law.

Thus, because of both the confusion in current choice of law doctrine and the inability of a state's court system to transform itself into the court system of another state, "correct" choice of law cannot justify an otherwise ultra vires assertion of authority.

CONCLUSION

In 1979, Professor Hazard wrote:

> [What the law of state court jurisdiction ought to be] depends upon the premises from which one begins. One can start, for example, with something like the following set of ideas: The federal union is made up of separate states; the states are endowed severally with sovereign power to

168. Guaranty Trust Co. v. York, 326 U.S. 99 (1945).
169. Byrd v. Blue Ridge Elec. Coop., 356 U.S. 525 (1958).
170. *Hanna*, 380 U.S. at 472.

> administer civil justice; state sovereignty is delimited by state territory; and only such matters as can be considered "within" the state's territory are within the state's judicial sovereignty. In this limited view of things, the modern "minimum contacts" principle is merely a constraint on a theory of jurisdiction that is based on a concept of the states as independent polities. The state court systems are thus to be autonomous, self-sufficient, self-regarding, and preoccupied with their separate legal existence, even at the cost of being collectively ineffective to dispose of complicated multistate cases.
>
> On the other hand, one can view each state's court system as a constituent of a national legal system whose common objective is to supply an appropriate forum for every domestic case, however complicated. Under this view, the proper measure of a state's judicial authority is not what the state as an independent polity might legitimately do, but what it ought to do in tacit collaboration with courts of other states in order to establish a coherent national system of civil justice.[171]

This expression of opinion pre-dates *World-Wide*, and no one appears to have argued since 1980 that the limits on state court jurisdiction should be analyzed as though the United States possessed a unitary "national legal system." Nonetheless, this quotation helps to focus the point of this Article. The logical implication of rejecting the idea that the state courts are part of a "national legal system" is that state courts are "autonomous" and "self-sufficient," as befits arms of "independent polities."

This Article has shown that the assumption of the states' independence permits the deduction of the character of limitations on state court jurisdiction. Part II showed that state authority in the United States is generally limited to controlling people, things, or events within state territory. Assuming that a state's assertion of personal jurisdiction is limited in the same way as are other exercises of authority, personal jurisdiction would similarly extend only to people, things, or events within state territory. *World-Wide*'s general approach of focusing on territorial limitations on state authority thus makes sense. The additional intent element, however, does not correspond to limitations imposed in other areas of the law, and therefore cannot be deduced from sovereignty concepts. Part III refuted various objections and alternatives to this structural approach to jurisdiction.

Personal jurisdiction is simply one way in which a government exercises authority. Rules of jurisdiction must therefore fit within whatever

171. Hazard, *Interstate Venue*, 74 NW. U.L. REV. 711, 720 (1979).

limitations on government authority exist generally. By focusing on the general limits of state sovereignty, *World-Wide* was at least asking the right question, although its answer to that question is not entirely correct. In contrast, the critics of *World-Wide* do not address the relationship between jurisdiction and general state authority. Thus, their problem is not simply the giving of a wrong answer—they ask the wrong question.